Supreme Court, U.S.
FILED

No. 97 640 OCT 10 1997

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICAN CITIGAS CO.,
Petitioner,

v.

VORYS, SATER, SEYMOUR & PEASE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

Whether, in the absence of extraordinary circumstances, a federal district court must abstain from exercising diversity jurisdiction over a declaratory judgment action presenting only state-law issues when the same issues are pending before a state court in an earlier filed action between the same parties.

PARTIES TO THE PROCEEDINGS

Petitioner American CitiGas Co. is the defendant in this case; respondent Vorys, Sater, Seymour & Pease is the plaintiff.

Petitioner American CitiGas Co. states, pursuant to Rule 29.6 of the Rules of this Court, that it is a privately held corporation that has no parent companies or subsidiaries that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

In *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), this Court held that, when parallel litigation concerning the same issues is pending in state court, a federal district court must presumptively abstain from exercising diversity jurisdiction in a declaratory judgment action presenting only issues of state law. But in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), a case that did not involve diversity jurisdiction, the Court applied a presumption in favor of exercising jurisdiction despite the pendency of parallel state litigation. The Courts of Appeals thereafter divided. Some circuits continued to apply *Brillhart* in diversity cases; others applied *Colorado River*; and still others allowed district courts to exercise presumption-less discretion, guided only by a list of "factors" that differed from circuit to circuit.

When this Court revisited the area three Terms ago in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), it rejected the application of the *Colorado River* presumption in a diversity case. But the Court was not faced with (and said nothing about) the choice between, on the one hand, a presumption *against* exercising jurisdiction and, on the other hand, a presumption-less regime. The circuits remain divided on this important and recurring issue of law, and this Court should now resolve the conflict.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) was designated not for publication; it is listed in a table reported at 114 F.3d 1190. The district court's opinions denying CitiGas's abstention motion (Pet. App. 11a-24a) and granting Vorys Sater's motions for summary judgment (Pet. App. 25a-42a, 43a-44a) are not reported.

JURISDICTION

The court of appeals entered judgment on May 9, 1997. The court of appeals denied a timely petition for rehearing on July 14, 1994. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Declaratory Judgments Act provides in pertinent part: "In a case of actual controversy within its jurisdiction . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . ." 28 U.S.C. § 2201(a). The Anti-Injunction Act provides in pertinent part: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate judgments." 28 U.S.C. § 2283.

STATEMENT OF THE CASE

This lawsuit involves a dispute between American CitiGas Co. ("CitiGas")[1] and Vorys, Sater, Seymour & Pease ("Vorys Sater"), a law firm that represented CitiGas on a contingency-fee basis in an action against a third party. After the law firm settled that dispute without CitiGas's approval, CitiGas sued Vorys Sater in Texas state court for breach of contract and malpractice. Eighteen months later, Vorys Sater brought a declaratory judgment action in federal district court in Ohio, requesting a declaration that it was not liable to CitiGas and was permitted to retain its $22.5 million contingent fee. Despite the earlier filed suit in state court, the district court refused to stay or dismiss Vorys Sater's federal case. When the Texas case was within days of going to trial the Ohio federal court granted Vorys Sater's motion for summary judgment, and Vorys Sater immediately pleaded res judicata in the Texas action. The Sixth Circuit, applying the same presumption-less abstention test as the district court, affirmed.

A. Background.

1. In 1982, CitiGas entered into a long-term contract (worth well over $100 million in future profits) with steel manufacturer USX Corp. in which USX agreed to purchase natural gas from CitiGas. *See* Pet. App. 3a. Soon thereafter, USX breached, and CitiGas filed suit in Texas state court. *Id.* The dispute between USX and CitiGas was eventually litigated before an arbitrator in Columbus, Ohio. *See id.* In this connection, CitiGas retained as counsel the Columbus, Ohio, law firm of Vorys Sater. *See id.* Citigas and Vorys Sater entered into a contingency-fee agreement under which Vorys Sater was to receive approximately 25% of any recovery. *See id.*

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[1] In and before 1993, CitiGas was known as Energy Buyers Service Corporation. This petition will refer to both that company and CitiGas as CitiGas.

On December 21, 1992, the arbitrator awarded CitiGas approximately $117 million in damages, plus interest (which could have substantially increased the award). *See id.* Without consulting CitiGas, Vorys Sater then brought suit in federal district court in Columbus seeking confirmation of the award pursuant to the Federal Arbitration Act, 9 U.S.C. § 9. *See* Pet. App. 3a; Sixth Circuit Joint Appendix ("C.A. App.") 484. In the Fall of 1993, Vorys Sater lawyers asked CitiGas for permission to pursue settlement negotiations with USX; CitiGas gave its permission but made clear that Vorys Sater was not to enter into any agreement without CitiGas's prior approval. *See* Pet. App. 3a-4a. Without further consulting CitiGas (and against its wishes), Vorys Sater then urged the district court to put on hold its deliberations in the confirmation case in light of the settlement negotiations. *See* C.A. App. 485, 792; *see also* Pet. App. 28a-29a n.5.

Vorys Sater's negotiations with USX culminated in a meeting on November 23, 1993, in Pittsburgh, Pennsylvania, at which Vorys Sater, acting with apparent authority on CitiGas's behalf, settled the case. *See* Pet. App. 3a. Vorys Sater's John Elam then telephoned Citigas's president Robert Silverthorn and reported that USX had agreed to pay $95 million plus up to $8.75 million in matching[2] charitable contributions. *See id.* Silverthorn responded—and confirmed by fax that same day—that this was not satisfactory and that Elam should "undo" the deal. *See id.* at 3a-4a; C.A. App. 677. Ignoring these instructions (and apparently hoping to prevail upon CitiGas to accept the deal later), Vorys Sater secretly continued to pursue a settlement agreement by exchanging a number of draft contracts with USX. *See* C.A. App. 703-05.

Eventually, Silverthorn agreed to meet with USX's Chairman Charles Corry in Houston, Texas, on December

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[2] Because CitiGas was interested in making substantial donations to charity, Vorys Sater had negotiated terms under which USX would be required to match CitiGas's donations to certain USX-approved charities up to a maximum of $1.75 million per year and a total of $8.75 million over twelve years. *See* C.A. App. 744-45.

9, 1993. *See* Pet. App. 4a. At a pre-meeting, "Elam informed Silverthorn, Sr. that a settlement with USX had not been reached, but that he was of the opinion that CitiGas should accept the proposed settlement," *id.*; Silverthorn, however, refused to yield to Vorys Sater's pressure and rejected the proposed settlement. *See* Pet. App. 4a.[3] Nevertheless, when Silverthorn later that day tried to negotiate better terms, Corry and other USX officials took the position that Vorys Sater had already committed CitiGas to a legally binding agreement, and that, if CitiGas did not execute the settlement that day, USX would take immediate action in federal court to enforce its bargain. *See id.* When Silverthorn asked Elam to respond, Elam—contradicting his earlier advice—conceded "that he had made a binding settlement agreement with [USX] on November 23," and advised Silverthorn that USX would be able to enforce that agreement in federal court. *Id.* Bowing to the inevitable, Silverthorn reluctantly agreed to proceed. *See id.* USX ultimately made the required $95 million payment to Vorys Sater as the parties' escrow agent (as required under the settlement papers).

After the Houston meeting, CitiGas discharged Vorys Sater, and, on December 27, 1993, brought suit in state court in Houston (where CitiGas has its offices), charging Vorys Sater with breach of contract. *See id.*[4] The next day, however, Vorys Sater moved to intervene in the still-pending confirmation action in federal court in Columbus, Ohio, seeking a declaratory judgment that it was entitled to pay itself and keep a $ 22.5 million contingent fee out of the escrow account into which USX was to wire the settlement funds. *See id.* Vorys Sater also sought an

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[3] Silverthorn's resistance to the proposed terms was informed by the fact that Vorys Sater had strongly recommended settlement at every stage of the case, even when USX opened with an offer to settle the case for as little as $5 million. *See* C.A. App. 728.

[4] CitiGas later amended its complaint to add a count for malpractice.

injunction prohibiting CitiGas from pursuing state-court proceedings or altering the settlement agreement. *See id.* at 32a. Later that same day, the court granted Vorys Sater's motion to intervene, permitted Vorys Sater immediately to distribute $22.5 million to itself, and issued the requested injunction. *See id.* Vorys Sater has had the funds in its possession ever since.

More than a year later (in February 1995), Vorys Sater tried to remove the Texas state-court action to the United States District Court for the Southern District of Texas, but that court found that Vorys Sater's removal occurred outside the 30-day deadline imposed by 28 U.S.C. § 1446(b) and was therefore "totally unwarranted." C.A. App. 193, 199. Soon thereafter, Vorys Sater suffered another procedural setback, when—almost 18 months after Vorys Sater had intervened—the federal court in Ohio granted CitiGas's motion to dismiss Vorys Sater's complaint for lack of diversity jurisdiction and, accordingly, dissolved the improper injunction against state-court litigation. *See* Pet. App. 32a-33a.[5] Vorys Sater the next day[6] filed the instant diversity action in the same federal court, its complaint raising the same issues that were being presented contemporaneously in state court. *See* C.A. App. 11. The case was ultimately assigned to the same judge as the confirmation case. *See id.* at 352.

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[5] Although CitiGas later reincorporated in Nevada, CitiGas was an Ohio corporation when Vorys Sater (an Ohio partnership) filed its complaint in intervention. *See* Pet. App. 5a & n.1. Thus, no diversity of citizenship existed at the time of filing. *See generally* C. Wright, A. Miller & E. Cooper, 13B *Federal Practice & Procedure* § 3608, at 458 (2d ed. 1984).

[6] The district court's opinion states that the intervention case was dismissed on December 2, 1994. *See* Pet. App. 32a. This is not correct. The intervention case was actually dismissed on June 22, 1995, *see* C.A. App. 201, and Vorys Sater filed its new federal action the next day, *see id.* at 11.

2. In due course, CitiGas moved the district court to stay or dismiss the new federal case, arguing that, under *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), the court should decline to exercise jurisdiction over Vorys Sater's declaratory judgment suit in light of the earlier filed state action. The district court, however, denied CitiGas's motion, saying that "a district court has considerable discretion in determining whether to exercise jurisdiction over a complaint seeking declaratory relief." Pet. App. 18a; *id.* (referring to its discretion as "broad," "unique," and "substantial"). The court made no mention of a presumption against exercising jurisdiction.

Instead, framing the question before it as "whether it makes better sense for the federal court or the state court to preside over and resolve a particular case," *id.* at 19a, the court identified five factors that it believed weighed in favor of exercising jurisdiction: (1) that it was familiar with the issues in the case due to the previous confirmation action, *id.* at 19a-20a; (2) that it had already expended judicial resources on the dispute whereas the Texas action had been "dormant by comparison," *id.* at 20a; (3) that it had an interest in "regulating the conduct of attorneys who practice before it," *id.* at 22a; (4) that the applicable substantive law would be that of Ohio (not Texas), which the district court would be in "as good a position as the Texas state court" to interpret, *id.*; and (5) that it was not clear whether the Texas court would have in personam jurisdiction over Vorys Sater, *id.* The court rejected CitiGas's argument that exercise of jurisdiction would condone forum shopping: the court stated that it was understandable for Vorys Sater to want to litigate in its home town, and suggested that CitiGas's earlier filing in Houston (its home town) could just as well be viewed as forum shopping. *See id.* at 23a.

3. Contrary to the district court's intimations, the Texas action was far from dormant. The Texas court had already fixed a trial date, *see* Sixth Circuit Record Docu-

ments ("R.D.") 35,[7] and had reassigned the case to a different judge after Vorys Sater asked the first-assigned judge to recuse himself, *see* Pet. App. 21a. The court had also disposed of Vorys Sater's motion to dismiss for lack of in personam jurisdiction, denying the motion after discovery, briefing, and argument, *see* R.D. 49. After the Ohio federal court denied CitiGas's abstention motion, the Texas case only continued to gather steam. Following extensive briefing and argument, the Texas court entered an order holding that Ohio law would apply to the parties' dispute, accompanied by a comprehensive opinion reviewing the facts and claims involved in the case. *See id.* at 57. Moreover, at the close of discovery, the court required the parties to make a full pretrial submission (including lists of witnesses and exhibits, deposition designations, and proposed jury instructions), which each of the parties did within the time allowed. *See id.* at 54, 55. The Texas court's activity culminated when, on April 22, 1996, the court preferentially set the case for trial as of May 3, 1996. *See* C.A. App. 612.[8]

Throughout this activity, Vorys Sater carefully avoided making any dispositive motion in the state-court action, perhaps fearing a defeat that might have res-judicata consequences for its federal case. It did, however, file a motion for summary judgment in the Ohio federal court. *See id.* at 238. This motion was still pending when the Texas court issued its April 22, 1996, order preferentially setting the Texas case for trial. When that happened, Vorys Sater (apparently concerned that the state court would beat the federal court to judgment) immediately

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[7] This would be the first of a series of orders setting four different trial dates (the court postponing trial in light of pretrial matters each time). *See also* C.A. App. 235, 612; R.D. 51, 52. In contrast, the federal court in Ohio never set a trial date.

[8] Under Texas procedure, a "preferential" trial date guarantees that trial will in fact commence on the designated date. *See* R.D. 52, Exh. A, ¶ 5.

notified the federal court in Ohio that trial in Texas was imminent. *See id.* at 610.

4. The very next day, the district court granted Vorys Sater's motion for summary judgment. *See* Pet. App. 25a.[9] In its opinion, the district court reasoned that, under principles of agency law, "ratification" of an agent's unauthorized contract entitles the agent to the same compensation as that to which he would have been entitled if he had acted within his authority. *See id.* at 36a-37a & n.13. The court then held that CitiGas had ratified the unauthorized settlement by executing the settlement agreement and accepting the settlement proceeds, *see id.* at 39a-40a, and it rejected CitiGas's argument that no ratification occurs where, as here, a principal has no choice but to affirm an unauthorized agreement, *see id.* at 40a-41a.

The court's opinion further stated in a footnote that Vorys Sater was entitled to an additional fee of more than $2 million (plus prejudgment interest since the date of settlement) in connection with USX's obligation to make charitable contributions, saying that "[t]he plain language of the fee agreement gives Vorys the right to a contingent fee on any amount recovered in connection with the arbitration." *Id.* at 42a & n.16. The court so held even though the contingency agreement defined "recovery" as "actual receipt of payment," C.A. App. 20a; even though, at the time, USX had made only about $300,000 of matching contributions (while CitiGas had already donated $8.75 million to a charitable foundation), *see id.* at 595, 1080; and even though USX's obligation to make further contributions over a twelve-year period was subject to conditions, *see supra*, p. 4 n.2.[10]

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[9] Immediately thereafter, Vorys Sater filed a "plea in bar" in the Texas action, arguing that the court should give res-judicata effect to the federal court's judgment. *See* R.D. 12. That motion is still pending.

[10] The district court later denied CitiGas's motion for reconsideration on the issue of the charitable contributions, saying that CitiGas

The district court in the same opinion denied CitiGas's still-pending motion for reconsideration of the court's earlier order denying CitiGas's abstention motion, this time relying on only two factors. *See* Pet. App. 26a. *First*, the court stated simply that the Texas court "still has not devoted to its parallel case the degree of judicial resources this Court has expended on this matter or the earlier, related case." *Id. Second*, the court repeated that Ohio law would apply to the merits, and pointed to the fact that, since the court's order refusing to abstain, the Texas court had agreed that Ohio law applied. *See id.*

B. The Decision Below.

The Court of Appeals for the Sixth Circuit affirmed. *See id.* at 2a. Concerning the abstention issue, the court said that the district court "did not abuse its discretion" in denying CitiGas's abstention motion. *Id.* at 5a. Like the district court, the court of appeals made no mention of any presumption against exercising jurisdiction. Instead, the court simply listed four factors as militating in favor of exercising jurisdiction: (1) that the district court was "substantially familiar with the circumstances underlying the instant suit"; (2) that the district court had already "expended considerable resources on the parties' dispute"; (3) that "the district court has a strong interest in regulating the conduct of attorneys who practice before it"; and (4) that "Ohio law applies to the parties' claims." *Id.* at 5a-6a. On the whole, the court of appeals said, the district court "did not err in refusing to defer to the Texas court." *Id.* at 6a.

As for summary judgment, the court held that CitiGas had ratified the unauthorized settlement on the new (and

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"did not present *evidence*" with its opposition to Vorys Sater's motion for summary judgment "to show that it had received only a portion of the $8.75 million in matching charitable contributions, though it could easily have done so." Pet. App. 44a. The court so held even though Vorys Sater had never disputed that USX made only a small fraction of the promised charitable contributions.

factually unfounded) theory that CitiGas had agreed to additional settlement terms after Vorys Sater had without authority settled the case. *See id.* at 6a-9a. The court also agreed with the district court that Vorys Sater was entitled to a 25% contingency fee with respect to the $8.75 million in future charitable contributions, saying that "[t]here is no question that the $8.75 million was 'recovered,' although it did not pass through the hands of Citigas," and that "[t]here is no claim here that USX is incapable of making such a charitable contribution." *Id.* at 9a. The court simply disregarded the clear language of the contingency-fee agreement, *see supra*, p. 9, and ignored that USX had not yet paid and may never pay $8.75 million, *see id.*

The court later denied CitiGas's petition for rehearing and suggestion for rehearing en banc. *See id.* at 45a.

REASONS FOR GRANTING THE PETITION

As respondent conceded in its briefs below, the circuits are divided as to the proper standard for evaluating whether a district court, in a diversity action involving only issues of state law that are already before a state court in a parallel action, should exercise jurisdiction over a declaratory judgment claim. The Fifth and Ninth Circuits have held that district courts must, absent extraordinary circumstances, abstain from exercising jurisdiction, whereas the Sixth and most other Circuits leave the decision to the district court's presumption-less discretion. The Fifth and Ninth Circuits' approach is the better one; the presumption-less approach undermines values of federalism and comity and condones end-runs around applicable removal rules. Because the instant case presents the abstention issue properly and in a particularly compelling context, this Court should use it to resolve the conflict on this important and recurring issue.

I. THE COURTS OF APPEALS ARE DIVIDED AS TO THE APPLICABLE LEGAL STANDARD.

The Declaratory Judgments Act provides that, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration . . . ." 28 U.S.C. § 2201(a) (emphasis added). This Court has said that "[t]his is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952). The district court's decision whether to exercise jurisdiction has been said to turn on (1) whether " 'the judgment will serve a useful purpose in clarifying and settling the legal relations at issue,' " and (2) whether " 'it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.' " C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure* § 2759, at 647-48 (2d ed. 1983) (quoting E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941)).

In *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), however, the Court held that, where parallel litigation is pending in state court, district courts must presumptively abstain from exercising jurisdiction.[11] The Court stated that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." 316 U.S. at 495; *see id.* ("Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should

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[11] *See* G. Giesel, *The Expanded Discretion of Lower Courts to Regulate Access to the Federal Courts After Wilton v. Seven Falls Co.: Declaratory Judgment Actions and Implications Far Beyond*, 33 Hous. L. Rev. 393, 404 (1996) ("[t]he Court enunciated . . . a presumption, in certain circumstances, that the federal court would not hear the matter"); *id.* at 419 (same).

be avoided."). Whether exercise of jurisdiction is proper in such cases, the Court stated, turns on whether "the claims sought to be adjudicated . . . could adequately be tested in the . . . proceeding pending in the . . . state court." *Id.* at 495-96. This, in turn, might depend on "the scope of the pending state court proceeding and the nature of defenses open there," on "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding," and on "whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." *Id.* at 495.

The Court reaffirmed the *Brillhart* presumption in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126 (1968), in which it stated flat-out that "a federal district court should, in the exercise of discretion, decline to exercise jurisdiction over a diversity action raising issues of state law when those same issues are being presented contemporaneously to state courts." The Court accordingly made its holding in *Provident Tradesmens Bank* turn on whether the declaratory judgment plaintiffs "would have had a satisfactory opportunity to litigate the issue . . . in the state actions." *Id.* at 126-27.

Later developments, however, arguably cast doubt on the continuing validity of *Brillhart*'s rule. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (which itself involved a declaratory judgment action, though not one based on diversity jurisdiction), the Court—citing but not discussing *Brillhart*—appeared to set forth standards generally applicable "in situations involving the contemporaneous exercise of concurrent jurisdictions," *id.* at 817, and held that, absent "exceptional" circumstances, district courts must exercise jurisdiction, *id.* at 818; *see id.* at 819 ("Only the clearest of justifications will warrant dismissal."); *id.* at 820 ("heavy obligation to exercise jurisdiction"). The Court explained that, in deciding whether such circumstances are present, district courts should consider (1) whether either the state or the federal court has assumed jurisdic-

tion over property, (2) whether the federal forum would be inconvenient, (3) whether exercising jurisdiction would result in piecemeal litigation, and (4) whether the state court or the federal court first acquired jurisdiction. *See id.* at 818.[12]

In the wake of *Colorado River*, the circuits—tugged in different directions by *Colorado River*'s presumption in favor of and *Brillhart*'s presumption against exercising jurisdiction—divided into three different camps. The Second Circuit and panels of the Eighth Circuit held that *Colorado River* had in effect overruled *Brillhart*, so that a presumption in favor of exercising jurisdiction applied even in declaratory judgment actions based on diversity jurisdiction.[13] Other courts rejected that position, but these courts split further still. Whereas the Fifth[14] and

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[12] In a later case, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Court amplified *Colorado River*'s presumption in favor of exercising jurisdiction. *Id.* at 16 ("balance heavily weighted in favor of the exercise of jurisdiction"); *id.* at 19 ("exceptional circumstances"). The Court also listed the additional factors of (5) whether "federal law provides the rule of decision on the merits," *id.* at 23, and (6) whether there is "probable inadequacy of the state-court proceeding," *id.* at 26.

[13] *See, e.g., Lumbermens Mut. Cas. Co. v. Connecticut Bank & Trust*, 806 F.2d 411, 413-14 (2d Cir. 1986); *BASF Corp. v. Symington*, 50 F.3d 555, 557-58 (8th Cir. 1995); *Insurance Co. of Pa. v. Syntex Corp.*, 964 F.2d 829, 834 (8th Cir. 1992).

[14] The Fifth Circuit's approach originated in *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989), in which the court drew by analogy on the Anti-Injunction Act, 28 U.S.C. § 2283, holding that, "if an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction," *id.* at 506 (internal quotation marks omitted). The court has "characterized *Jackson* as a new type of abstention," *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993), *cert. denied*, 511 U.S. 1032 (1994); in practice, it has translated into a strong presumption against exercising jurisdiction, *see, e.g., Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948,

Ninth [15] Circuits continued to apply a presumption against exercising jurisdiction, other circuits in essence occupied a middle ground between *Brillhart* and *Colorado River*. These courts saw no presumption either way and, to "guide" a district court's discretion, articulated an amalgam of factors (different in almost every circuit) derived from *Colorado River*, *Brillhart*, and general-purpose Declaratory Judgments Act cases.[16]

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950 (5th Cir. 1994) ("abstention from a declaratory judgment action is ordinarily appropriate when the state offers an adequate alternative forum in which to resolve the particular dispute"); *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993) ("as a general rule, the district court may not consider the merits of the declaratory judgment action when 1) a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff, 2) the state case involves the same issues as those involved in the federal case; *and* 3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act") (emphasis in original); *Magnolia Marine Transp. Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1581 (5th Cir. 1992) ("district court should determine whether the state action provides an adequate vehicle for adjudicating the claims of the parties").

[15] *See, e.g., Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1370-71 (9th Cir. 1991) ("when a state court action is pending presenting the same issue of state law as is presented in a federal declaratory suit, there exists a presumption that the entire suit should be heard in state court") (internal quotation marks omitted); *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991) ("when a party requests declaratory relief in federal court and a suit is pending in state court presenting the same state law issues, there exists a presumption that the entire suit should be heard in state court").

[16] *See, e.g., Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n.3 (1st Cir. 1986) ("we agree that a federal court's duty to exercise its discretion is relaxed in the declaratory judgment context, [but] the *Colorado River* factors themselves run substantially parallel to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction over an action brought under 28 U.S.C. § 2201"); *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1224 (3d Cir. 1989) ("In addition to the *Brillhart* factors," district court must consider "(1) the likeli-

The approach of the Sixth Circuit (the court below) is representative of the latter, presumption-less, strain of authority. For example, in *Allstate Ins. Co. v. Green*, 825 F.2d 1061 (6th Cir. 1987), the court stated that "it is clear that a district court's grant or denial of declaratory relief must be predicated on an exercise of its discretion after full inquiry into all relevant considerations," *id.* at 1065, and that "the mere existence of a state court proceeding is not determinative," *id.* at 1067. The court then listed as "factors" for the guidance of the district court: "(1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory relief is being used merely for the purpose of procedural fencing or to provide an arena for a race for *res judicata*; (4) whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is

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hood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in a settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies.") (internal quotation marks omitted); *Continental Cas. Co. v. Fuscardo*, 35 F.3d 963, 966 (4th Cir. 1994) ("court must consider . . . (1) the strength of the state's interest in having the issues raised in the federal declaratory action decided in the state court; (2) whether the issues raised in the federal action can be more efficiently resolved in the pending state action; (3) whether the federal action might result in unnecessary entanglement between the federal and state systems due to overlapping issues of fact or law; and (4) whether the federal action is being used merely as a device for 'procedural fencing,' i.e., to provide another forum in a race for *res judicata*"); *Allstate Ins. Co. v. Green*, 825 F.2d 1061, 1063-67 (6th Cir. 1987) (discussed in text); *United States Fidelity & Guar. Co. v. Murphy Oil USA, Inc.*, 21 F.3d 259, 261-63 (8th Cir. 1994) (rejecting *Colorado River*'s presumption, yet applying *Colorado River*'s factors to guide the district court's discretion); *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994) (following the Sixth Circuit's five-factor test set forth in the *Green* case, discussed in the text).

better or more effective." *Id.* at 1063 (internal quotation marks omitted).[17]

In *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), this Court revisited the area, framing its inquiry as "whether the discretionary standard set forth in *Brillhart* . . . or the 'exceptional circumstances' test developed in *Colorado River* . . . governs a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings." *Id.* at 279. Rejecting an argument that *Brillhart* had become "an outmoded relic of another era," the Court held that *Colorado River's* extraordinary-circumstances test is inapplicable to declaratory judgment actions. *Id.* at 286. The Court had no occasion, however, to address the split between courts applying a *Brillhart* presumption and courts applying no presumption at all, and it sent mixed signals in that regard. On the one hand, the Court reaffirmed *Brillhart* as a valid precedent and quoted its "uneconomical as well as vexatious" language, thereby arguably endorsing the Fifth and Ninth Circuits' approach.[18] On the other hand, the Court's opinion contained much discretion-related language that might be interpreted—when read out of context—to reject a presumption either way.[19]

In *Wilton*'s wake, the conflict described above has persisted. The presumptive approach has developed into an extraordinary-circumstances test that is the precise opposite of the *Colorado River* test. *See, e.g., Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1424 (9th Cir. 1997) (question is "whether *exceptional cir-*

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[17] *See also Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996); *Nationwide Mut. Fire Ins. Co. v. Willenbrink*, 924 F.2d 104, 105 (6th Cir. 1991).

[18] *See id.* at 282, 286.

[19] *See, e.g., id.* at 283 ("Brillhart's notions of broad discretion"); *id.* at 286 ("unique and substantial discretion"); *id.* at 287 ("the unique breadth of this discretion to decline to enter a declaratory judgment").

cumstances exist that would justify a departure from the rule . . . that ordinarily federal courts should abstain from exercising their jurisdiction in a declaratory judgment action over disputes between insurance companies and their insureds in which the merits must be decided under state law") (internal quotation marks omitted) (emphasis added).[20] Meanwhile, the presumption-less strain of authority has persisted equally unaffected;[21] indeed, *Wilton* has been cited as providing support for a presumption-less test.[22]

As respondent itself acknowledged in its briefs below,[23] more is at stake than an abstract issue concerning the

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[20] *See also Budget Rent-A-Car v. DeCoite*, 113 F.3d 1132, 1134 (9th Cir. 1997); *Little Giant Mfg. Co. v. Chromalox Indus. Heating Prods.*, No. 96-CV-44, 1996 U.S. Dist. LEXIS 9079, at *18-*19 (E.D. Tex. June 26, 1996).

[21] *See, e.g., Youell v. Exxon Corp.*, 74 F.3d 373, 375-76 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 2514 (1996); *NYLife Distributors, Inc. v. Adherence Group, Inc.*, 72 F.3d 371, 382-83 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1826 (1996); *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 257 (4th Cir. 1996); *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996); *GNB Battery Technologies, Inc. v. Gould, Inc.*, 65 F.3d 615, 621 (7th Cir. 1995).

[22] *See, e.g., Poston*, 88 F.3d at 257-58; *GNB Battery*, 65 F.3d at 621; *see also Government Employees Ins. Co. v. Dizol*, 108 F.3d 999, 1013 (9th Cir.) (Schroeder, J., dissenting) ("the Supreme Court's language in *Wilton*, that the facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within the district courts' grasp, appear to foreclose such a presumption") (internal quotation marks and brackets omitted), *reh'g en banc granted*, 118 F.3d 661 (9th Cir. 1997).

[23] In its briefs in the Sixth Circuit, Vorys Sater urged the court not to follow the Fifth Circuit's *Jackson* approach, saying that "[t]he Sixth Circuit has not embraced *Jackson* abstention." Notice Respecting Jurisdiction and Memorandum at 26 (May 7, 1996) ("May 7, 1996, Br."); *see* Brief of Plaintiff-Appellee at 47 (Oct. 16, 1996) ("Oct. 16, 1996, Br.") ("the Fifth Circuit has extrapolated from the Anti-Injunction Act to create a new type of abstention for certain federal suits . . . [but] [t]he Sixth Circuit has not endorsed this invention").

wording of the applicable standard: the conflict directly determines the outcome of individual cases. For example, in a recent pair of cases arising out of the very same Exxon Valdez disaster, the Ninth Circuit held that the presumption in favor of abstention is so strong that, even though federal maritime law applied to the dispute on the merits, the district court abused its discretion by exercising jurisdiction; in contrast, the Second Circuit held that, precisely because federal maritime law applied, the district court abused its discretion by *not* exercising jurisdiction. *Compare Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166, 170 (9th Cir. 1997), *with Youell v. Exxon Corp.*, 74 F.3d 373, 376 (2d Cir.), *cert. denied*, 116 S.Ct. 2514 (1996). Similarly, in dissenting opinions in *Government Employees Ins. Co. v. Dizol*, 108 F.3d 999 (9th Cir.), *reh'g en banc granted*, 118 F.3d 661 (9th Cir. 1997),[24] and *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1377 (9th Cir. 1991), Judges Schroeder and Hall, respectively, urged the adoption of a presumption-less test in the Ninth Circuit, obviously believing that the outcome in the cases before them would have been different under it.[25]

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[24] A scheduling order in the *Dizol* case indicates that the court agreed to rehear the case en banc to decide whether a declaratory judgment defendant waives the abstention issue by failing to raise it in the district court, or whether the court of appeals must raise it on its own motion. *See Dizol*, Order, No. 95-17393 (9th Cir. July 7, 1997). Rehearing in that case therefore does not bear on the question here presented.

[25] According to Judge Schroeder, "[o]ur circuit law, that district courts should abstain in the absence of exceptional circumstances warranting the exercise of jurisdiction, is hard to square with the statute, the Rule, 60 years of history, or Supreme Court case law." *Dizol*, 108 F.3d at 1014-15; *see id.* at 1012 ("by continuing to reinforce in this circuit the presumption against federal jurisdiction in diversity insurance litigation, we continue to move away from Congress' objectives in both creating the Declaratory Judgment Act and maintaining the vitality of diversity jurisdiction"). Judge Schroeder has since reiterated her views in dissenting opinions in *Budget Rent-A-Car v. DeCoite*, 113 F.3d 1132 (9th Cir. 1997),

Resolution of this conflict is particularly appropriate because the issue at hand affects a vast number of federal-court cases. In particular, insurance carriers as a matter of course sue in federal court for declarations concerning their duty to defend and indemnify when an insured is sued in state court. *See Dizol*, 108 F.3d at 1012 ("there has been routine invocation of declaratory judgment jurisdiction in diversity insurance cases") (Schroeder, J., dissenting); *see generally* 10A Wright & Miller § 2260, at 659; Giesel, 33 Hous. L. Rev. at 400 & n.32. Thus, in the less than two-and-a-half years since the Court decided *Wilton*, the case has been cited in almost 200 federal-court decisions included in the Lexis database.

II. THE PRESUMPTION-LESS APPROACH OF THE SIXTH AND OTHER CIRCUITS UNDERMINES VALUES OF FEDERALISM AND COMITY AND SUBVERTS REMOVAL RULES.

On the merits, the Fifth and Ninth Circuits' approach constitutes a better rule than that of the court below. At the outset, it is clearly wrong to argue (as respondent did in its briefs below[26]) that *Wilton* modified the rule announced in *Brillhart*. In *Wilton*, the district court had refused to exercise jurisdiction, and the court of appeals had affirmed the district court's decision. *See Wilton*, 515 U.S. at 280-81. Thus, the Court understandably addressed only the district court's discretion to decline jurisdiction; the question under what circumstances a district court *must* decline jurisdiction was simply not before

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Polido v. State Farm Mut. Auto. Ins. Co., 110 F.3d 1418 (9th Cir. 1997), and *Budget Rent-A-Car v. Crawford*, 108 F.3d 1075 (9th Cir. 1997).

[26] In the court below, respondent argued that, if *Brillhart* expressed a presumption against exercising jurisdiction, *Wilton* repudiated it. *See* May 7, 1996, Br. at 20 ("Before *Wilton*, . . . *Brillhart* . . . could have been read to support a bias against exercising jurisdiction over pure declaratory judgment actions . . . . But . . . *Wilton* noticeably softened it."); Oct. 16, 1996, Br. at 43 ("*Wilton* noticeably softened any bias expressed in *Brillhart*").

the Court. Accordingly, the discretion-related language in the Court's opinion quoted *supra*, at p. 17 n.19, should not be read to repudiate, soften, or otherwise modify the *Brillhart* presumption.

It is further clear that *Brillhart*'s is a salutary rule. For one thing, as *Brillhart* itself made clear, exercise of jurisdiction in the face of parallel state-court litigation inevitably risks an unseemly race to *res judicata*, thereby undermining values of federalism and comity. *See Brillhart*, 316 U.S. at 495. Indeed, as the Fifth Circuit has observed, a declaratory judgment action often accomplishes precisely the same result as an injunction against state-court litigation, so that the federalism-related values underlying the Anti-Injunction Act are directly implicated.[27]

For another thing, without the *Brillhart* presumption, jurisdiction under the Declaratory Judgment Act can easily be perverted into an end-run around 28 U.S.C. § 1446, which limits removal both as to the federal district court to which a defendant may remove and as to

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[27] *See Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988) (en banc) ("To allow declaratory relief in these circumstances would be to transform [the Anti-Injunction Act] from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand."); *id.* at 506 ("if an injunction would be barred by [the Anti-Injunction Act], this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction") (internal quotation marks omitted), *cert. denied*, 490 U.S. 1035 (1989); *see also Samuels v. Mackell*, 401 U.S. 66, 72 (1971) ("ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid"); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540, 545 n.4 (1946) ("The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment.") (citing *Brillhart*).

the time within which a defendant must do so.[28] Without *Brillhart*'s presumption, state-court defendants can "remove" a case to any federal court of their choosing, no matter how long after the state-court action was filed. "Historically, the law has accorded a plaintiff the right to choose the forum in which to litigate his case," *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1071 (11th Cir. 1987), *aff'd*, 487 U.S. 22 (1988), and, contrary to the district court's intimations, *see* Pet. App. 23a, "a plaintiff's choice of forum" must be accorded even "greater deference when the plaintiff has chosen the home forum," *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). The presumption-less approach practiced outside the Fifth and Ninth Circuits fatally subverts this traditional regime.

III. THIS CASE PRESENTS THE ABSTENTION ISSUE PROPERLY AND STARKLY.

The instant case provides a particularly attractive vehicle to resolve the split of authority described above. There can be no doubt that the outcome in this case would have been different in the Fifth and Ninth Circuits.

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[28] Indeed, the Fifth and Ninth Circuits have observed that their approach is necessary for precisely this reason. *See, e.g., Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166, 170 (9th Cir. 1997) ("Declaratory relief is not . . . a substitute for removal."); *id.* ("It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act, and such would be the result in the instant case.") (internal quotation marks omitted); *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1373 (9th Cir. 1991) ("allowing this action to proceed would violate the spirit, if not the letter, of the diversity removal provision"); *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 508 n.24 (5th Cir. 1988) (en banc) ("We decline to authorize an 'end run' around removal procedures and jurisprudence by authorizing a party to ignore removal (and its limitations) but nevertheless achieve the same result by filing a federal court declaratory judgment suit with the sole objective of litigating a preemptive defense to the federal defendant's earlier filed, pending state court suit against the federal plaintiff.").

This case could have been equally well (if not better) disposed of in state court: the federal and state cases involve the very same parties, claims, and issues. This is not a case in which the state court has incomplete jurisdiction over the parties; in which the state court is unable to join a necessary party; in which the state court is unable to fashion full relief; in which the state-court action is more limited in scope than the federal action; or in which some other circumstance exists that might rebut the presumption against jurisdiction.[29]

Moreover, the facts of this case bring into sharp focus the forum-shopping concerns that lie at the root of the Fifth and Ninth Circuits' approach, for it is clear that the lower courts' refusal to abstain was instrumental to Vorys Sater's improper efforts to secure a friendly forum. Vorys Sater first intervened in the arbitration-confirmation case in the Ohio federal court and prevailed upon that court to enjoin state-court litigation, but the court ultimately dismissed Vorys Sater's action for lack of subject-matter jurisdiction. *See supra*, p. 6. Vorys Sater then attempted to remove CitiGas's state-court suit to a federal district court in Texas, but that court held that Vorys Sater's removal attempt was time-barred and thus "totally unwarranted." *See id.* Vorys Sater finally filed a new suit in federal court in Ohio—almost *18 months* after CitiGas filed its suit in Texas state court. *See id.* All the while, Vorys Sater was careful not to file a dispositive motion in the pending state-court suit in Texas, lest that court's decision become a res-judicata bar. *See id.* at 8.

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[29] Although the Sixth Circuit's decision was unpublished, it is clear from other, published, decisions that the Sixth Circuit subscribes to the presumption-less school. *See supra*, pp. 16-17 & 17. In this respect, this case is no different from *Wilton* itself: there, the decision below was designated not for publication at the time the Court granted certiorari, *see* 29 F.3d 623 (5th Cir. 1994) (table); *see also Wilton*, 515 U.S. at 281, though the Fifth Circuit ordered the case published after the writ issued, *see* 41 F.3d 934 (5th Cir. 1994).

Vorys Sater then convinced the district court not to abstain and, in the end, precipitated an unseemly rush to judgment: the district court granted summary judgment one day after Vorys Sater informed it that the Texas case was about to go to trial. *See id.* at 8-9.

This case further illustrates how, but for a presumption against exercising jurisdiction, a plaintiff's choice of forum can be subverted on exceedingly tenuous grounds: each of the four "factors" on which the court of appeals relied, *see id.* at 10, is insubstantial. As for the district court's supposed familiarity with the underlying issues, the confirmation case was short-lived, terminated by consent, and, in any event, did not involve Vorys Sater's misconduct. To the extent the district court's familiarity resulted from the intervention case, it was improperly obtained, because the court lacked jurisdiction from the outset. As for the judicial resources the district court purportedly expended, the Texas court would have been well ahead by that count but for the district court's improper injunction against state-court litigation, and, in any event, had disposed of all pre-trial matters (including issues of personal jurisdiction and choice of law) and was about to empanel a jury. As for the district court's interest in regulating the conduct of attorneys who practice before it, it seems ironic that attorneys' misconduct should be rewarded with the forum of their choice. Finally, as for the fact that Ohio law applied, the common-law ratification issues on which the court of appeals resolved the case do not differ appreciably among the states, and, in any event, state courts are well-equipped to interpret and apply out-of-state law.

In sum, this case shows how the presumption-less approach allowed a federal court to abort a state action that had been filed 18 months before the federal action, had already consumed substantial judicial resources, had been remanded after an improper removal attempt, and was about to go to trial. Because this case vividly illus-

trates the friction between federal and state courts created by the presumption-less approach, it will serve well as a vehicle for the resolution of the persisting conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 10, 1997

APPENDICES

APPENDICES

APPENDIX A

[Filed May 9, 1997]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-3781, 95-3834, 96-3481

VORYS, SATER, SEYMOUR AND PEASE,
Plaintiff-Appellee,
Intervenor-Appellant,

v.

AMERICAN CITIGAS COMPANY,
Defendant-Appellant.

AMERICAN CITIGAS COMPANY,
formerly ENERGY BUYERS SERVICE CORPORATION,
Plaintiff-Appellee,
Cross-Appellant,

VORYS, SATER, SEYMOUR AND PEASE,
Intervenor-Appellant,
Cross-Appellee,

v.

USX CORPORATION,
c/o Prentice Hall Corporation System
Statutory Agent,
Defendant.

On Appeal from the United States District Court
for the Southern District of Ohio

Before: SILER and BATCHELDER, Circuit Judges; HULL, District Judge.*

SILER, Circuit Judge. In appeal number 96-3481, defendant, American Citigas Co. f/k/a Energy Buyers ("Citigas"), appeals the district court's grant of summary judgment to plaintiff, Vorys, Sater, Seymour & Pease ("Vorys"). Specifically, Citigas argues that its affirmance of the settlement agreement between Citigas and USX did not entitle Vorys to contingent attorney's fees. In appeal numbers 95-3781 and 95-3834, Vorys, as intervenor, appeals the district court's dismissal of its cross-claim for contingent attorney's fees and Citigas cross-appeals. These appeals challenge whether the district court had subject matter jurisdiction over Vorys's cross-claim, which Vorys brought in the original suit between Citigas and USX Corporation ("USX"). For the following reasons, the court finds the issues in appeal numbers 95-3781 and 95-3834 to be moot but AFFIRMS the decision of the district court in appeal number 96-3481.

I. BACKGROUND

Vorys seeks a judgment pursuant to 28 U.S.C. § 2201 declaring its right to keep a contingent attorney's fee and an award of additional attorney's fees plus interest. The attorney's fees relate to Vorys's representation of Citigas in an arbitration confirmation proceeding and the settlement of that confirmation proceeding. Citigas asserts counterclaims, arguing that Vorys is liable for malpractice and, accordingly, that Citigas is entitled to recover the contingent fee and damages. In particular, Citigas alleges that Vorys bound it to an unauthorized settlement.

Vorys is a law firm with its principal office in Columbus, Ohio. Citigas is a closely-held Nevada corporation with

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* The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

its principal place of business in Texas. During the arbitration confirmation proceeding and the settlement of that proceeding, Citigas was an Ohio corporation known as Energy Buyers.

Citigas and USX had an agreement pursuant to which Citigas was to supply USX with natural gas. USX breached the agreement. Citigas filed a breach of contract action against USX in Texas state court. The Texas court remanded the case for arbitration. The matter proceeded to binding arbitration in Columbus, Ohio. Citigas retained Vorys to represent it in the arbitration proceeding. The fee agreement essentially provided that Vorys would receive a twenty-five percent contingent fee from any settlement or judgment against USX unless Citigas discharged the firm for reasonable dissatisfaction with its services. The arbitrator issued a final award in favor of Citigas in the amount of $116,549,041.00 plus interest for lost profits.

Citigas, by Vorys, filed an action in the district court to confirm the arbitrator's award. Vorys attorneys John Elam and John Keller were Citigas's trial counsel. The District court presided over the confirmation proceeding and heard oral argument on Citigas's petition.

Thereafter, in November 1993, the president of Citigas, Robert Silverthorn, Sr., authorized Elam to reopen settlement negotiations with USX. Elam subsequently met with the chief in-house counsel of USX, Don Sandman, on November 17, 19, and 23, 1993, to discuss the possibility of settling the arbitration case. At the November 23 meeting, Elam and Sandman reached an agreement in principle under which USX would pay Citigas $95 million and provide $8.75 million in matching charitable contributions. Citigas, however, withheld from Elam any authority to make or accept an offer of settlement. Silverthorn, Sr. expressed his dissatisfaction with the settlement and later sent a letter to Elam stating that Elam "had no authority

to make a deal with USX" and had better "undo it" because the deal was "completely unsatisfactory."

On December 9, 1993, Elam and Keller presented Silverthorn, Sr. with a draft of the settlement agreement. Elam informed Silverthorn, Sr. that a settlement with USX had not been reached, but that he was of the opinion that Citigas should accept the proposed settlement. Later that day, Silverthorn, Sr. met with USX's chairman, Charles Corry, to discuss settlement. When Silverthorn, Sr. attempted to negotiate settlement terms, Corry expressed his belief that USX and Citigas had reached a deal. When Silverthorn, Sr. questioned Vorys in regard to Corry's statement, Elam stated that he had made a binding settlement agreement with Sandman on November 23, 1993. Silverthorn, Sr. then affirmed the settlement agreement. Citigas subsequently discharged Vory's and filed suit against the law firm in a Texas state court, alleging that Vorys breached its contract with Citigas.

II. DISCUSSION

A. Subject Matter Jurisdiction

After its discharge, Vorys intervened in the confirmation proceeding between Citigas and USX and filed a cross-claim against Citigas, asserting its entitlement to a percentage of the settlement proceeds as payment for its legal services. After Vorys filed its cross-claim, Citigas merged Energy Buyers of Ohio with the newly-formed Citigas of Nevada corporation and Energy Buyers was merged out of existence. The district court subsequently entered a stipulated order, dismissing with prejudice the confirmation action, and held that it lacked subject matter jurisdiction over Vorys's cross-claim because Vorys and Citigas were both Ohio residents when Vorys filed its cross-claim.

Vorys contends that: 1) courts have supplemental jurisdiction over fee disputes involving work performed in the

underlying case, and 2) the jurisdictional requirements of section 1332 are met when diversity exists between the plaintiff-intervenor and the original defendant.[1] Citigas argues that if the district court erred by dismissing Vorys's cross-claim for lack of subject matter jurisdiction, then it also erred by failing to dissolve its own injunction enjoining the parties from litigating the fee dispute in any other court.[2]

This court declines to address the issue raised in appeal numbers 95-3781 and 95-3834 because these issues are moot. Following the dismissal of its cross-claim, Vorys refiled its claim against Citigas for contingent attorney's fees in the same district court in Ohio. These claims are at issue in appeal number 96-3481. This second suit meets jurisdictional requirements.

B. Abstention

The district court did not abuse its discretion by refusing to stay or dismiss this case in favor of the pending Texas lawsuit. The district court was substantially familiar with the circumstances underlying the instant suit because it had been involved with this case since December 1992, when Citigas filed the confirmation action. The court had expended considerable resources on the parties' dispute and was well-acquainted with this case, including the controversy surrounding the settlement, Vorys's representation, and attorney's fees. Furthermore, the district court has a strong interest in regulating the conduct of attorneys who practice before it. The conduct giving rise to this action occurred in Ohio and was perpetrated by Ohio attorneys.

Additionally, as the district court and the Texas state court found, Ohio law applies to the parties' claims in the

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[1] When Vorys filed its cross-claim, it was an Ohio corporation and USX was a Pennsylvania corporation.

[2] Citigas seeks to pursue its suit against Vorys in the Texas state court.

instant case. During the events that led to this suit, Vorys and Citigas were both citizens of Ohio. The original contract underlying the dispute was one to supply natural gas to USX's Ohio facilities. That contract provided that it was to be construed according to Ohio law and provided for arbitration in Columbus, Ohio. Citigas retained an Ohio law firm, Vorys, to represent it in the arbitration that took place in Ohio. Vorys's representation of Citigas occurred in Ohio. The underlying action was settled in Ohio. Accordingly, the State of Ohio had the most significant relationship to the key factors underlying the dispute between Citigas and Vorys. A federal district court sitting in Ohio is in at least as good of a position as a Texas state court to pass on issues of Ohio law. Considering the district court's familiarity with the facts in this case, it did not err in refusing to defer to the Texas court.

C. Ratification

Citigas ratified or otherwise affirmed the settlement agreement with USX. The court need not determine whether Citigas ratified Vorys's unauthorized and nonbinding actions or subsequently approved Vorys's unauthorized but binding actions because Citigas does not seek to reject or disavow the settlement.[3]

D. Liability of Agent Notwithstanding Ratification

A principal's ratification or affirmance of an agent's unauthorized act in excess of his power to bind the principal

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[3] If Vorys had apparent authority to bind Citigas, then subsequent acceptance or approval of Vorys's actions by Citigas would not have constituted a ratification of Vorys's actions. *See* RESTATEMENT (SECOND) OF AGENCY § 82, cmt. a (stating that ratification is "to be distinguished from the situation in which an agent, although without authority nevertheless binds the principal because he acted within his apparent authority, scope of employment or other agency power . . . and in which later the principal, satisfied with the transaction, accepts the proceeds in lieu of a claim against the agent, or otherwise indicates approval").

releases the agent from liability in damages to the principal for having violated a duty to him. RESTATEMENT (SECOND) OF AGENCY § 416. No release from liability to the principal occurs, however, when the principal must affirm the act to protect his own interests or when the principal is caused to ratify or affirm by the misrepresentation or duress of the agent. *Id.* & cmt. c (stating that agent remains liable when principal's affirmance "is a result of the agent's fraud or other similar conduct"); RESTATEMENT (SECOND) OF AGENCY § 462.

A principal ratifies or affirms the unauthorized act of his agent only if the "principal, *with full knowledge of the facts,* conducts himself in a way which manifests his intention to approve an earlier act performed by his agent which did not bind him." *Karat Gold Imports, Inc. v. United Parcel Serv., Inc.*, 577 N.E.2d 115, 120 (Ohio Ct. App. 1989) (emphasis added); *see also* RESTATEMENT (SECOND) OF AGENCY § 416, cmt. b (stating that principal must have knowledge of all material facts for affirmance to be effective).

Vorys argues that, after the December 9 meeting, USX introduced a new settlement term: it demanded that Citigas's individual shareholders execute personal releases. The requirement of releases, however, was present in the proposed original agreement. Nevertheless, that proposed original agreement was marked up by Silverthorn, Sr. and Charles Corry, the Chairman of USX. This marked-up copy of the agreement shows that Silverthorn, Sr. and Corry deleted all references to releases by individual shareholders. Thus, the initialed agreement that was the starting point for the Pittsburg meeting did not include the requirement that the shareholders execute releases.

Moreover, if when Silverthorn, Sr. signed the settlement he believed that the release requirement was a new and material term that would have allowed him to avoid execution of the agreement, then he ratified Vorys's actions

leading up to the settlement and cannot allege misconduct on the part of the law firm. Prior to signing the settlement agreement, Silverthorn, Sr.'s son, an attorney, informed him that USX's requirement of individual releases "could be a breach by USX of the agreement on November 23rd; on the other hand, it could be a vehicle by which to avoid having to execute, from [Citigas's] standpoint, the agreement of November 23rd." Although Silverthorn, Sr. submitted an affidavit in which he stated that neither his son nor any Vorys attorney advised him that USX would be unable to enforce the agreement if he refused to sign the personal release, in his deposition, he stated he knew that USX "also wanted . . . the shareholder releases." He further stated in that same deposition, taken at a time prior to the date of the affidavit, "that USX required that the [personal shareholder] releases were necessary [for the deal to proceed to completion]." "[A] party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts his earlier deposition testimony." *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315 (6th Cir. 1989) (quoting *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986)). Therefore, the deposition testimony demonstrates that Silverthorn, Sr. knew that the personal releases were an additional requirement being put forward by USX.

In the alternative, Vorys contends that Silverthorn, Sr.'s son believed that the personal release term would allow Citigas to avoid the settlement. Arguing that the son was general counsel to Citigas, Vorys concludes that notice to the son, as agent, was notice to Citigas, as principal. Although it might be contested that Silverthorn, Jr. was general counsel to Energy Buyers, nevertheless Silverthorn, Sr. sent Silverthorn, Jr. to the Pittsburg meeting as counsel to Energy Buyers to finalize the agreement. For instance, Silverthorn, Sr. stated in several places in his deposition that Silverthorn, Jr. had been sent to Pittsburg to negotiate

as the legal advisor or counsel for Energy Buyers. Silverthorn, Jr. also admits in his deposition that he was to go to Pittsburg as general counsel for Energy Buyers. Thus, any notice to Silverthorn, Jr. was a notice to Citigas. When Silverthorn, Jr. advised his father that he could still back out of the deal, then the father was on notice on behalf of the corporation that it was not bound by the allegedly unauthorized settlement agreement negotiated by Vorys.

Citigas has also raised issues concerning the decision by the district court with regard to the amount of fees allowed. First, Citigas asserts that Vorys cannot recover its fee based upon the full settlement amount because no allocation was made between the arbitration and TXO cases. However, Citigas did not pay any contingent fee to the law firm in Texas which recovered nothing. The district court did not err, inasmuch as the contingent fee agreement between Vorys and Energy Buyers concerned the amount of the recovery, and did not distinguish between the TXO case and the arbitration case. Although Citigas does not contest the computation of the contingent fee for the main settlement, except for an allocation for the TXO case, it does question whether Vorys is entitled to receive its contingent fee for the $8.75 million in matching charitable contributions which USX agreed to make as a part of the settlement.

The court granted the contingent fee of twenty-five percent of the amount pledged as a charitable contribution, because the contingent fee agreement provides for the fee to be computed on the "recovery." There is no question that the $8.75 million was "recovered," although it did not pass through the hands of Citigas. Nevertheless, it was a benefit conferred upon it under the settlement agreement, so Vorys is entitled to its contingent fee upon that recovery. There is no claim here that USX is incapable of making such a charitable contribution.

Finally, Citigas claims that the court erred by granting prejudgment interest on the contingent fee for the charitable contribution, calculated from December 9, 1993. That was the date that it became due, as it was the date the amount was "recovered," because that was the date of the signing of the agreement. *See Horning-Wright Co. v. Great Am. Ins. Co.*, 500 N.E.2d 890, 893 (Ohio Ct. App. 1985). Prejudgment interest is to be calculated from the date that the payment becomes due under the contract. *Id.* In this case, as USX was obligated to make the charitable contribution immediately, prejudgment interest should be calculated from that date, December 9, 1993. Therefore, the district court did not err by awarding the contingent fee and the interest thereon.

AFFIRMED.

APPENDIX B

[Filed Dec. 1, 1995]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-95-636
JUDGE SMITH
Magistrate Judge Kemp

VORYS, SATER, SEYMOUR and PEASE,
Plaintiff,

-v-

AMERICAN CITIGAS COMPANY,
Defendant.

OPINION AND ORDER

Vorys, Sater, Seymour and Pease ("Vorys") seeks a judgment under 28 U.S.C. § 2201 declaring its right to keep a contingent attorneys' fee, as well as its right to recover additional unpaid fees in the amount of $2,187,-500 plus interest, in connection with its representation of defendant American Citigas Company ("American Citigas") in Case No. C-2-92-1162 before this Court. American Citigas moves to dismiss or stay, arguing that the Court should decline to exercise jurisdiction over this action. For the reasons that follow the Court denies American Citigas' motion to dismiss or stay.

I.

On October 15, 1982, USX Corporation ("USX") agreed to buy natural gas from the predecessor of American Citigas, Energy Buyers Service Corporation ("Energy Buyers"). USX breached the agreement. Energy Buyers filed an action against USX in Texas state court in Sep-

tember 1987, asserting claims of breach of contract and tortious interference arising from the 1982 agreement.

USX filed a petition for mandamus to compel arbitration, which the state court granted. The matter proceeded to binding arbitration in Columbus, Ohio. On December 16, 1992, the arbitrator issued a final award in favor of Energy Buyers which included $116,549,041 plus interest for lost profits. On December 22, 1992 Energy Buyers initiated an action to confirm the arbitrator's award under 9 U.S.C. § 9, Case No. C-2-92-1162. The undersigned District Judge presided over all proceedings in that case.

The original parties fully briefed the issues and the Court heard oral argument on October 13, 1993. Negotiations ensued, and the original parties settled their dispute in December 1993. In essence the settlement agreement provided that USX would pay Energy Buyers $103.75 million.

Vorys represented Energy Buyers during the underlying arbitration as well as in the instant case through the litigation and settlement phases. Vorys and Energy Buyers had entered into a fee agreement in April and May 1991 under which Vorys was to have received a twenty-five percent contingent fee from any settlement or judgment against USX unless Energy Buyers discharged Vorys for reasonable dissatisfaction with Vorys' services "for any reason." Under the fee agreement, if Energy Buyers discharged Vorys, Energy Buyers would pay Vorys on an agreed hourly fee basis. Three letters memorialize the fee agreement: two prepared by Vorys and one prepared by Energy Buyers.

Shortly after Energy Buyers and USX reached a settlement agreement, Energy Buyers purportedly terminated the representation of Vorys.[1] The reason for the purported

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[1] Energy Buyers asserts that it orally terminated Vorys on December 9, 1993 and confirmed this termination in a letter to Vorys dated December 27, 1993.

termination was Vorys' alleged failure to obtain Energy Buyer's approval before binding it to the settlement agreement with USX. On December 27, 1993 Energy Buyers filed an action in Texas state court against Vorys asserting breach of contract based on Vorys' alleged failure to obtain approval for the settlement.

On December 28, 1993, one day after receiving a letter purportedly terminating it, Vorys moved to intervene in Case No. C-2-92-1162 under Fed. R. Civ. P. 24 to protect its interest in the settlement proceeds under its contingent fee agreement with Energy Buyers. On December 29, 1993, the Court entered orders granting Vorys' motion for leave to intervene and enjoining the parties from litigating the fee dispute in any other court.

Also on December 29, 1993, articles of incorporation for Energy Buyers were filed with the State of Nevada.[2] That same day, Energy Buyers' stockholders adopted an Agreement of Merger to merge the Ohio corporation with the new Nevada corporation. On December 30, 1993, the Ohio Secretary of State filed certificates of merger, and the Ohio corporation known as Energy Buyers was merged out of existence. The successor Nevada corporation was named American Citigas Company.

On December 2, 1994, American Citigas moved the Court to dismiss Case No. C-2-92-1162 or, in the alternative, to dissolve the injunction and stay further proceedings. On June 22, 1995, the Court granted American Citigas' motion, holding that it lacked subject-matter jurisdiction over Vorys' claims under 28 U.S.C. § 1367(b) because, at the time of Vorys' intervention, diversity of citizenship did not exist.

Vorys filed the instant action on June 23, 1995, asserting the same claims it raised as an intervenor in Case No. C-2-92-1162. The Chief Judge of this District drew the

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[2] Energy Buyers was an Ohio corporation.

instant case. The case was transferred to the docket of the undersigned District Judge by an order dated October 11, 1995.

II.

American Citigas argues that the Court should not exercise jurisdiction over Vorys' claims because to do so would violate:

(1) the Anti-Injunction Act;

(2) the first to file rule;

(3) the principles governing declaratory judgment actions set forth in *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995) and *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); and

(4) the principle of federalism expressed by the abstention doctrine in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

The Court will first examine these principles generally, and then discuss them as they apply to this case.

A. The Anti-Injunction Act

American Citigas contends that issuance of a declaratory judgment in this case would have the same effect as an injunction barred by the Anti-Injunction Act, 28 U.S.C. § 2283. Section 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Vorys does not seek an injunction. American Citigas nevertheless maintains that issuance of a declaratory judgment in this case would have the same effect as an injunction, and the Court should therefore dismiss or stay this action. *See Samuels v. Mackell*, 401 U.S. 66, 72

(1971) ("[E]ven if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would."); *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) ("[I]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction."), *cert. denied*, 490 U.S. 1035 (1989).

B. The First to File Rule

The first to file rule provides that where two federal actions have been filed involving the same claims and parties, only the action filed first should proceed. *See American Modern Home Ins. v. Insured Accounts Co.*, 704 F. Supp. 128, 129 (S.D. Ohio 1988). "The first to file rule, however, is not hard and fast; rather the general principle is to avoid duplicative litigation." *Id.*

C. The *Brillhart* Rule

The basic rule of *Wilton* and *Brillhart* is that federal district courts have considerable discretion in determining whether to decline to exercise jurisdiction over a declaratory judgment action where a parallel state court action is pending. The Court in *Wilton* explained:

> Over 50 years ago, in *Brillhart* . . . , this Court addressed circumstances virtually identical to those present in the case before us today. An insurer, anticipating a coercive suit, sought a declaration in federal court of nonliability on an insurance policy. The District Court dismissed the action in favor of pending state court garnishment proceedings, to which the insurer had been added as a defendant. The Court of Appeals reversed, finding an abuse of discretion, and ordered the District Court to proceed to the merits. Reversing the Court of Appeals and remanding to the District Court, this Court held that, "[a]l-

though the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction." . . . The Court explained that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." . . . The question for a district court presented with a suit under the Declaratory Judgment Act, the Court found, is "whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under applicable substantive law, can better be settled in the proceeding pending in the state court." . . .

Brillhart makes clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Although *Brillhart* did not set out an exclusive list of factors governing the district court's exercise of this discretion, it did provide some useful guidance in that regard. The Court indicated, for example, that in deciding whether to enter a stay, a district court should examine "the scope of the pending state court proceeding and the nature of the defenses open there." . . . This inquiry, in turn, entails consideration of "whether the claims of all parties can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." . . . Other cases, the Court noted, might shed light on additional factors governing a districts court's decision to stay or to dismiss a declaratory judgment action at the outset. . . . But *Brillhart* indicated that, at least where another suit involving the same parties and presenting opportunity for ventilation of the state issues is pending in state

> court, a district court might be indulging in "[g]ratuitous interference," . . . if it permitted the federal declaratory action to proceed.

115 S.Ct. at 2140-41 (internal citations omitted); *see also Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (6th Cir. 1990) (listing factors applicable to determination of whether to exercise jurisdiction over declaratory judgment action when parallel state court proceeding is pending). The Court in *Wilton* rejected the argument that the *Colorado River* "exceptional circumstances" test applied to the district court's decision to decline to exercise jurisdiction over a declaratory judgment action where a parallel state court proceeding is pending. *Id.* at 2142.

D. *Colorado River* Abstention

As noted above, *Wilton* expressly held that the *Colorado River* "exceptional circumstances" test does not apply in the circumstances presented in this case. The Court will nevertheless examine the *Colorado River* doctrine.

Under the *Colorado River* doctrine, a district court may stay a federal action in deference to parallel litigation in state court only in "exceptional circumstances." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14, 19 (1983). The Sixth Circuit has identified the following factors to be considered in determining whether to grant such a stay:

> (1) whether federal or state law provides the basis for decision of the case;
>
> (2) whether either court has assumed jurisdiction over any *res* or property;
>
> (3) whether the federal forum is less convenient to the parties;
>
> (4) avoidance of piecemeal litigation; and
>
> (5) the order in which jurisdiction was obtained.

Crawley v. Hamilton County Commissioners, 744 F.2d 28, 31 (6th Cir. 1984) (cites omitted). No single factor is determinative. *Id.* The balancing of these factors must be weighed heavily in favor of the exercise of federal jurisdiction. *Id.* Among other factors that may be considered is the progress that has been made in each of the two actions. *Id.*

E. Analysis

The Declaratory Judgment Act states in part:

> In a case of actual controversy within its jurisdiction, . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Here, "may" connotes discretion. It is well-established that a district court has considerable discretion in determining whether to exercise jurisdiction over a complaint seeking declaratory relief. *National Emblem Ins. Co. v. Washington,* 482 F.2d 1346 (6th Cir. 1973). The U.S. Supreme Court in *Wilton* described the discretion as "broad" and "unique and substantial." 115 S.Ct. at 2141, 2142.

The legal principles discussed in the previous sections of this opinion are essentially directed to the same basic issue: should a district court, in its discretion, exercise jurisdiction over claims in light of a parallel state court action?[3] In essence, these doctrines, viewed in their

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[3] The first to file rule, of course, is designed to determine whether a federal court should defer to another federal court. In any event, the Court finds that this rule has no practical bearing on the instant case. The first filed federal action, was Case No. C-2-92-1162. This Courts' judgment dismissing Vorys' intervention in that case

proper contexts, provide non-exclusive factors to guide district courts in determining whether to exercise jurisdiction. The common goals of these doctrines include the wise use of judicial resources, federalism, and comity. The various concepts can be synthesized to the extent they represent common sense considerations for deciding whether it makes better sense for the federal court or the state court to preside over and resolve a particular case. None of the doctrines purports to be jurisdictional, strictly speaking.[4]

More importantly, none of the doctrines referenced above contemplates the unique circumstances presented in this case, *viz*: this Court has substantial knowledge and

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is currently on appeal in the United States Court of Appeals for the Sixth Circuit. The Court assumes, *arguendo*, that the first to file rule may apply between an action pending in the trial court and one on appeal.

This Court dismissed Vorys' intervention because it concluded that it lacked jurisdiction. If, on the one hand, the Court of Appeals affirms this Court's dismissal of Vorys' intervention, it would have no effect on the instant case. The jurisdictional impediment present in Case No. C-2-92-1162, lack of diversity at the time the intervention was filed, does not exist in the instant case. If, on the other hand, the Court of Appeals reverses this Court's judgment in Case No. C-2-92-1162, the posture of that case would be exactly the same as the present posture of the instant case. As a result, little or nothing would be gained by staying the instant case in deference to the pending appeal. Rather, judicial economy would best be served by a dismissal or stay of the appeal rather than this action.

[4] The Anti-Injunction Act might be an absolute bar if the Court were to issue an injunction. The authorities upon which American Citigas relies, however, do not speak in terms of an absolute bar to the extent they apply by analogy the policy behind the Act to certain declaratory judgment actions. Notably, the court in *Texas Employers* advised that the a declaratory judgment action "should" be barred if it has the effect of an injunction. In any event, this Court does not intend to enjoin the state court from proceeding to the merits of the claims before it. Whether any declaratory judgment this Court may issue would have *res judicata* effect would be for the Texas court to decide.

understanding of the underlying case and Vorys' claims as a result of presiding over Case No. C-2-92-1162; this Court has expended considerable resources on the parties' dispute; and the Texas state court action has been dormant by comparison.

For these reasons, the Court finds that a wooden, factor-by-factor analysis under the separate doctrines is not particularly helpful in this case. The better approach is a unified analysis under the overarching policies of judicial economy, federalism, and comity.

In its June 22, 1995 opinion and order in Case No. C-2-92-1162, this Court observed:

> The Court finds persuasive the policy reasoning behind the cases which hold that district courts have jurisdiction over attorneys' fees disputes arising from the original action. The court in *Harrison* [*Conference Servs. v. Dolce Conference Servs.*, 806 F. Supp. 23 (S.D.N.Y. 1992)] aptly stated:
>
> > Plaintiff next argues that judicial resources would not be economized if the court exercises jurisdiction. The court finds, to the contrary, that it can efficiently examine LeBoeuf's claims and plaintiff's defenses and counterclaims. Magistrate Judge Carter was intimately involved in the disclosure of plaintiff's trade secret document, and is generally familiar with LeBoeuf's conduct in this litigation. This court can quickly and carefully determine whether plaintiff's claims of misconduct and carelessness have merit.
>
> 806 F. Supp. at 26. Likewise, in the instant case, the Court is familiar with the parties' claims and could efficiently examine them. Although the underlying matter settled, the Court spent a great deal of time carefully examining the original parties' detailed briefs on the merits. The Court heard oral argument in the underlying case. The Court also presided over

> Vorys' intervention. More recently, the Court heard extensive explanations of the current parties' positions at a pretrial conference. The Court's familiarity with the case would likely result in a more efficient adjudication. As in *Harrison*, retention of jurisdiction in this case would serve judicial economy.

Opinion and order at 6-7. Although the Court considered *Harrison* and similar cases in the context of determining whether it had jurisdiction under 28 U.S.C. § 1367, the policy considerations expressed in the above-quoted text apply with equal force here.

The undersigned District Judge has dealt with this case from the filing of the confirmation action in December 1992 until the present day. This Court is well-acquainted with the underlying dispute as well as the controversy surrounding the settlement, Vorys' representation, and attorneys' fees. Indeed, the Court has expended considerable resources on this case and its efforts would be largely wasted it were to defer to the Texas state court in this matter.

In contrast, the Texas state Court has expended little in the way of judicial resources to this case. The Texas state court case has been virtually inactive since it was filed. The original state court judge recused himself from further participation in the case. It appears the new state judge assigned to the case has done nothing more than set the matter for trial by a standard administrative order.

The Court rejects the notion that its work on the underlying case is irrelevant to the current controversy. Rather, the Court's familiarity with the underlying action, the dispute over the settlement, and Vorys' representation of Energy Buyers give this Court unique insight in the instant case. Although the Court held that it lacked jurisdiction in Case No. C-2-92-1162, in reaching that conclusion the

Court had occasion carefully to examine and become familiar with the claims Vorys asserts in the instant case.[5]

Furthermore, the conduct giving rise to this action occurred within the framework of an action over which this Court presided. Aside from judicial economy, this Court has a strong interest in regulating the conduct of attorneys who practice before it. The Texas state court, by comparison, has no such interest in the instant case.

In addition, although the merits of this case will be governed by state law, it will likely involve application of Ohio law rather than Texas law. The parties were, during the events that led to the present controversy, both citizens of Ohio, although Energy Buyers' principal place of business was in Houston, Texas. The original contract in the underlying dispute was one to supply natural gas to USX Corporation's facilities at Lorain, Ohio and Haverhill, Ohio. The agreement provided that it was to be construed according to Ohio law, and provided for arbitration in Columbus, Ohio. Energy Buyers retained an Ohio law firm, Vorys, to represent it in the arbitration that took place in Ohio. Vorys' representation of Energy Buyers before this Court occurred in Ohio. The settlement of the underlying action was consummated in Ohio on January 3, 1994. Given these circumstances, there is little reason to believe that the present controversy is governed by Texas law, and this Court is in as good a position as the Texas state court to pass on issues of Ohio law.[6]

Moreover, this Court unquestionably has both personal and subject matter jurisdiction in this case. It is unclear whether the Texas state court has personal jurisdiction over Vorys given its limited contact with Texas.

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[5] It should be kept in mind that Vorys asserted the same claims in Case No. C-2-92-1162 as it does in the instant case.

[6] The Court does not intend for this discussion to be a final ruling on the choice of law issue, if such an issue exists in this case.

American Citigas raises two arguments that merit additional discussion. First, it contends that the instant action will not resolve the entire controversy because its professional malpractice claims are not before this Court. It is not, however, self-evident that Vorys' ratification theory, if meritorious, would not be dispositive of the malpractice claim. Also, American Citigas did not initially assert a professional malpractice claim in the Texas state court action, and there is nothing to prevent it from raising such a claim in the instant case. The Court finds that the absence of American Citigas' professional malpractice claim does not, at this juncture, tip the scales against the exercise of jurisdiction in this case.

American Citigas also villifies Vorys for alleged forum shopping. The Court feels constrained to point out that the argument cuts both ways. Vorys apparently prefers the forum of this Court, and there are legitimate reasons for such a preference, not the least of which is that the law firm's main office is located near this Court. It could not fairly be said, however, that this forum is perceived as more favorable or biased in Vorys' favor, given this Court's earlier dismissal of Vorys' claims in Case No. C-2-92-1162. American Citigas prefers Texas state court. Although it is a Nevada corporation, and a former Ohio corporation, its president, Robert S. Silverthorn, Sr., resides in Texas. This Court draws no inference from American Citigas' filing of the action in Texas, but it could be argued that it was a precipitous race to the courthouse to avoid this Court's jurisdiction.

In sum, the Court finds that in the unique circumstances presented in this case, the matter can be addressed more effectively in this Court than in the Texas state court. The Court further finds that exercise of jurisdiction over this case by this Court will not offend principles of federalism or comity, nor would it constitute gratuitous interference with the state court proceedings.

III.

Based on the above the Court DENIES American Citigas' motion to dismiss or stay (Doc. 4).

The Clerk shall remove Doc. 4 from the Court's pending motions list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH
Judge
United States District Court

APPENDIX C

[Filed Apr. 25, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-95-636
JUDGE SMITH
Magistrate Judge Kemp

VORYS, SATER, SEYMOUR AND PEASE,
Plaintiff,

-v-

AMERICAN CITIGAS COMPANY,
Defendant.

OPINION AND ORDER

Plaintiff law firm seeks a judgment under 28 U.S.C. § 2201 declaring its right to keep a contingent attorneys' fee, as well as an award of additional attorneys' fees of $2,187,500 plus interest. The attorneys' fees relate to plaintiff's representation of defendant in an arbitration confirmation proceeding before this Court, and the settlement of the confirmation proceeding.

Defendant asserts counterclaims, arguing that it is entitled to recover the contingent fee and damages because of plaintiff's alleged malpractice. The crux of defendant's malpractice counterclaims is that plaintiff bound defendant to an unauthorized settlement under which defendant was paid $103.75 million to settle an arbitration award of about $117 million.

Plaintiff moves for summary judgment in its favor on its own claims and defendant's counterclaims under the doc-

trine of ratification. For the following reasons the Court GRANTS plaintiff's summary judgment motions.

I.

As a preliminary matter, the Court will address defendant's motion to reconsider the Court's December 1, 1995 decision denying defendant's motion to dismiss or stay. The Court DENIES defendant's motion to reconsider for two reasons. First, the Texas state court still has not devoted to its parallel case the degree of judicial resources this Court has expended on this matter or the earlier, related case. Second, the Texas state court recently ruled that Ohio law rather than Texas law governs the parties' claims. This Court agrees with the Texas court's determination of this issue. As this Court stated in its December 1, 1995 decision, this Court is in as good or better a position to pass on issues of Ohio law as the Texas state court.

II.

Plaintiff, Vorys, Sater, Seymour and Peas ("Vorys"), is a law firm with its principal offices in Columbus, Ohio. Defendant, American Citigas Company ("ACC"), is a closely held Nevada corporation. ACC's predecessor in interest was an Ohio corporation, Energy Buyers Service Corporation ("Energy Buyers").[1]

In October 1982, Energy Buyers contracted with USX Corporation ("USX") to supply natural gas to USX facilities in Ohio. USX breached the contract. Energy Buyers filed an action against USX in Texas state court. The Texas court remanded the matter for arbitration.[2]

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[1] The Court will refer to ACC and Energy Buyers interchangeably.

[2] The Texas state court remanded Energy Buyers' breach of contract claim against USX, but retained jurisdiction over a tort claim against USX's subsidiary, TXO Corporation ("TXO").

In May 1991, Energy Buyers retained the Vorys law firm to represent it in the arbitration proceeding in Columbus, Ohio. The parties memorialized the fee agreement in a series of three letters. In essence, it provided that Vorys would receive a contingent fee unless Energy Buyers discharged Vorys for "reasonable dissatisfaction."

The arbitration proceeding commenced on September 16, 1991. Various damage models Energy Buyers constructed, but did not submit to the arbitrator, showed that if USX had exercised certain contractual rights to terminate or modify the natural gas contract, Energy Buyers' damages would have been about $11 million or $31 million, depending on which option USX would have exercised.

The arbitrator, however, selected a model of damages that assumed USX would have continued to buy natural gas at far above the market price, although USX had the contractual right not to do so. The arbitrator instead awarded to Energy Buyers the full contract price minus Energy Buyers' estimated costs of performance. The final award was $116,549,041, plus interest for lost profits.[8] Hence, the arbitration award could fairly be characterized as a windfall, representing many millions of dollars more than Energy Buyers would ever have received if the contract with USX had been performed.

On December 22, 1992, Energy Buyers, still represented by Vorys, filed an action in this Court to confirm the arbitrator's award under 9 U.S.C. § 9, Case No. C-2-92-1162. Vorys attorneys John Elam and John Keller were Energy Buyers' trial counsel.

The undersigned District Judge presided over all proceedings in Case No. C-2-92-1162. The Court heard oral argument on the confirmation petition on October 13, 1993.

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[8] The was a smaller award for gas delivered but not paid for.

In November 1993, Energy Buyers, represented by other counsel, proceeded to trial in Texas state court against USX's subsidiary, TXO. *See* note 2, *supra.* On November 12, 1993, the jury in the Texas state court action returned a verdict in TXO's favor. It appears that settlement discussions concerning the arbitration award against USX ensued shortly thereafter.

In mid-November 1993, John Elam met with the president of Energy Buyers, Robert Silverthorn, Sr., to discuss the possibility of resuming settlement discussions with USX.[4] Silverthorn, Sr. authorized Vorys to reopen negotiations with USX.

Elam then met with the chief in-house counsel of USX, Don Sandman, on November 17, 19, and 23, 1993, to discuss settlement of the arbitration case. At the November 23, 1993 meeting, Elam and Sandman reached an agreement in principle under which USX would pay Energy Buyers $95 million plus $8.75 million in matching charitable contributions.[5]

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[4] Earlier attempts at settlement were unfruitful.

[5] Elam contacted the Court to advise it that the parties were close to settlement. There was nothing improper about Elam's contact with the Court in this regard, which contact was made with the permission of USX. Sandman depo. at 112, 156. It is not unusual for counsel to advise the Court that the parties have settled or are close to settlement. This limited contact serves the important function of conserving judicial resources. At any given time, about 200-250 cases are pending on the docket of the undersigned judge. The Court cannot afford to waste its time adjudicating matters that have settled or appear very likely to settle. Silverthorn, Sr. seems to acknowledge that there is nothing *per se* improper about the status of settlement negotiations. Silverthorn, Sr. depo. at 216. He was concerned, however, that the contact resulted in a loss of "moral imperative."

"Moral imperative" would never have entered into the Court's deliberations in this case. The Court can understand why Robert Silverthorn, Sr. would have reason to ascribe a moral dimension to his dispute with USX. Energy Buyers' battle with the corporate

Silverthorn, Sr. expressed dissatisfaction with the settlement chiefly because he believed that Elam had failed to secure adequate assurance of payment.[6] Silverthorn, Sr. did not indicate that he was displeased with the amount of the settlement.

After Silverthorn expressed his views on this issue, Elam had difficulty contacting him for the next several days. During this time, Vorys and USX exchanged several drafts of a written settlement agreement. Attorney Robert Silverthorn, Jr., son of Silverthorn, Sr., and Energy Buyers' general counsel, reviewed and commented on these drafts.

Elam finally reached Silverthorn, Sr. by telephone on December 7 and 8, 1993. During these phone conversations, Silverthorn, Sr. agreed to meet face-to-face with president and chair of USX, Charles Corry to discuss the settlement. Elam arranged a lunch meeting between Silverthorn, Sr. and Corry for December 9, 1993.[7]

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behemoth, USX, has a flavor of David and Goliath about it. From a legal standpoint, however, Energy Buyers' claim against USX was simply one for breach of contract, and the Court's task in Case No. C-2-92-1162—evaluating the arbitrator's award of damages—was even one step removed from the breach inasmuch as the arbitrator's finding of liability was not challenged. In addition, settlement of financial disputes does not, in any event, result in loss of moral imperative: "Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the judge, and the judge will hand you over to the officer, and you may be thrown in prison. I tell you the truth, you will not get out until you have paid the last penny." Matthew 5:25-26 (NIV); *see also* Luke 12:57-59.

[6] Elam obtained an agreement that USX would back the settlement with a confession of judgment. Silverthorn, Sr. wanted the settlement to be backed by a letter of credit.

[7] Corry and Sandman had already planned to be in Houston on December 9, 1993 for a Marathon Oil board of directors meeting. Silverthorn, Sr.'s office and residence were in Houston.

Elam and Keller traveled to Houston, Texas for the meeting. On the morning of December 9, 1993, they met with Silverthorn, Sr. and others to discuss the settlement. During the morning meeting, Silverthorn, Sr., for the first time since November 23, expressed his belief that Energy Buyers should have received more money from USX. Silverthorn, Sr.'s belief appears to have been based on two assumptions: First, Mr. Silverthorn apparently thought that Energy Buyers was entitled to an award as favorable as the plaintiffs received from USX in another case, the so-called "LTV" case.[8] Second, Silverthorn, Sr. assumed that this Court would not only confirm the award, but that it would also declare that the arbitrator awarded prejudgment interest on the entire $116.5 million award for lost profits.[9]

Silverthorn, Sr., joined by Elam, Keller, and Silverthorn, Jr., then went to the Marathon Building to meet with Corry and Sandman. Silverthorn, Sr. had lunch with

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[8] In the LTV case, a federal court of appeals had already affirmed the judgment of the district court confirming an arbitration award. After the court of appeals' decision, USX settled for about 75% of the award. In the instant case, in contrast, this Court had not yet ruled on Energy Buyers' confirmation petition.

[9] Although this Court will not issue an advisory opinion on how it would have ruled on the issue, it feels constrained to point out that an award of prejudgment interest on the entire award for lost profits was very unlikely. It is difficult to believe that the arbitrator would assess millions of dollars in prejudgment interest without plainly saying he was doing so.

The arbitrator's use of the word "sum" in both paragraphs 2 and 3 suggests that prejudgment interest was not contemplated. If prejudgment interest were awarded, it would not be as to the "sum" but as to each separate payment when it actually became due over the entire period of the contract.

Moreover, the arbitrator rejected Energy Buyers' request for pre-award interest in the amount of $149,565,808. The award does not include this amount. In addition, Energy Buyers specifically requested post-award interest, thus explaining why the arbitrator would have included a reference to interest.

Corry, while the attorneys ate lunch in an adjoining conference room. At some point during the meeting, Silverthorn, Sr. expressed his belief that based on the result in the LTV case, Energy Buyers should have received more money from USX. Thereupon, Corry asked Sandman whether USX and Energy Buyers had reached a deal, to which Sandman responded affirmatively. Although the parties dispute exactly who said what, it appears that Silverthorn, Sr. then asked a similar question of his lawyers, who gave him a similar response.

Also at the lunch meeting, Silverthorn, Sr. requested that the payment date be moved from the date originally agreed upon, December 23, 1993, to January 3, 1994. Corry agreed to the request. Before Corry and Sandman left, Corry and Silverthorn, Sr. shook hands and indicated that they had a deal. Elam left soon after Corry and Sandman. Silverthorn, Sr., Silverthorn, Jr., and Keller remained behind and reviewed the written settlement agreement, which Corry had already signed. Silverthorn, Sr. initialed a number of changes in the agreement and then signed it.

Silverthorn, Sr. avers that he orally discharged the Vorys law firm late in the evening on December 9, 1993. John Keller, the alleged recipient of the notice of discharge, disputes this.

On December 10, 1993, Silverthorn, Sr., Silverthorn, Jr., and Keller met with Energy Buyers' tax advisors to review the settlement. Keller and Siverthorn, Jr. then took the signed settlement agreement to Pittsburgh for USX to review.

Over the next several days the parties continued to work on the agreement. For example, USX demanded that Energy Buyers' individual shareholders execute personal releases. Energy Buyers agreed to this additional term. Energy Buyers, through Silverthorn, Jr., continued to consult with Vorys attorneys on these matters.

On December 14, 1993, a closing was conducted in Vorys' offices in Columbus, Ohio. Robert Silverthorn, Sr. participated in the meeting by telephone. Silverthorn, Jr., Vorys attorneys, and a USX representative were present in person. Silverthorn, Sr. authorized Silverthorn, Jr. to initial additional changes to the agreement. The settlement was then closed. USX then immediately tendered to Vorys the initial $5 million as required under the agreement. The final payment of $90 million was scheduled to take place on January 3, 1994.

On December 15 and 16, 1993, Keller sent letters to Energy Buyers which included Vorys' calculation of the contingent fee to which it was entitled from the initial $5 million payment by USX. The next day Silverthorn, Sr. wrote to Vorys, instructing it on the distribution of the $5 million. The letter expressly authorized Vorys to pay itself $1,264,887, which was the exact amount of the contingent fee to which Vorys was entitled from the $5 million under the fee agreement.

On December 27, 1993, Silverthorn, Sr. faxed a letter to Vorys purporting to terminate Vorys "effective immediately." Vorys then intervened in Case No. C-2-92-1162 to protect its contingent fee. This Court issued an order allowing Vorys to pay itself the contingent fee from the final payment of $90 million, and enjoined the parties from litigating any fee dispute in any other forum.[10] Vorys paid itself the contingent fee from the $90 million, but never received a contingent fee from the $8.75 in matching charitable contributions. ACC received and retained the balance of the $95 million settlement proceeds.

On December 2, 1994, this Court granted ACC's motion to dismiss Vorys' intervention claims, holding that it lacked subject matter jurisdiction over Vorys' claims be-

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[10] Unbeknownst to Vorys or this Court, Energy Buyers had already filed an action against Vorys in Texas state court.

cause, at the time of Vorys' intervention, diversity of citizenship did not exist. Vorys filed the instant action on June 23, 1995. This case was transferred to the docket of the undersigned judge on October 11, 1995.

III.

Fed. R. Civ. P. 56(c) sets forth the procedure for addressing a summary judgment motion:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind

issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely " 'show that there is some metaphysical doubt as to the material facts.' " *Id.* (quoting *Matsushita,* 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

IV.

The Court must first examine whether Ohio law or Texas law governs this case. Vorys argues that Ohio law controls this matter; ACC contends that Texas law governs this action. As noted earlier, the Texas state court has already ruled that Ohio law controls.

A federal court must apply the choice of law rules of the state in which it sits. *Klaxon Co. Stentor Electric Mfg. Co.,* 313 U.S. 487, 496 (1941); *Mahalsky v. Salem Tool Co.,* 461 F.2d 581, 583 (6th Cir. 1972). Under Ohio law, if the parties have not made an effective choice of law in their agreement, the court must examine:

> (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract,

> and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> (Section 188 of 1 Restatement of the Law 2d, Conflict of Laws, adopted and applied).

Gries Sports Enterprises v. Modell, 15 Ohio St. 3d 284 (1984) (syllabus by the court), *cert. denied*, 473 U.S. 906 (1985); *see also Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339, 342 (1984) (tort choice of law factors). Without belaboring the point, the Court finds that application of the *Gries* and *Morgan* factors to the instant case results in the conclusion that Ohio law governs this case. As the Texas state court aptly found, although some contacts with Texas undeniably exist, "Ohio has the most significant relationship to the key contacts to be considered in determining this dispute," including "the settlement activity between Vorys Sater and USX, the drafting of documents, the advice to the client, and the closing of the settlement, including the deposit of funds with the Ohio lawyers as escrow agent was centered in Ohio." *American Citigas Company v. Vorys, Sater, Seymour, and Pease*, No. 93-065297 (151st Dist. Texas, Mar. 21, 1996) (Garcia, J.) at 9, 8.[11]

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[11] As this Court found in its December 1, 1995 opinion and order:

> The parties were, during the events that led to the present controversy, both citizens of Ohio, although Energy Buyers' principal place of business was in Houston, Texas. The original contract in the underlying dispute was one to supply natural gas to USX Corporation's facilities at Lorain, Ohio and Haverhill, Ohio. The agreement provided that it was to be construed according to Ohio law, and provided for arbitration in Columbus, Ohio. Energy Buyers retained an Ohio law firm, Vorys, to represent it in the arbitration that took place in Ohio. Vorys' representation of Energy Buyers before this Court occurred in Ohio. The settlement of the underlying action was consummated in Ohio on January 3, 1994.

V.

Vorys asserts that under the ancient doctrine of ratification [12] it is entitled to judgment in its favor on its own claims and on ACC's malpractice counterclaims. Vorys argues, very simply, that ACC had one or more clear opportunities to avoid the $103.75 million settlement, but ACC chose instead to go forward with the settlement Vorys negotiated, and, with full knowledge, ACC received and retained the benefits of the settlement.

Under Ohio law, "[w]here an agent purports to act for a principal without the latter's knowledge, the principal may nevertheless be liable on obligations arising from the transaction if the principal later adopts or ratifies the agreement arising from the transaction or receives benefits from the agreement with knowledge of its terms." *Illinois Controls, Inc. v. Langham*, 70 Ohio St. 3d 512, 522 (1994). Ratification may be express or implied. *Campbell v. Hospitality Motor Inns*, 24 Ohio St. 3d 54, 57 (1986). Implied ratification occurs "where the principal receives and retains the benefits of a transaction with full knowledge of all material facts." *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 374 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1298 (1994) (citing *Meyer v. Klensch*, 114 Ohio App. 4 (1961)). As Vorys points out, ratification is a question of law to be decided by the court where the material facts are undisputed and establish each element. *Karat Gold Imports v. United Parcel Service*, 62 Ohio App. 3d 604, 612 (1989).

The doctrine of ratification is often raised in connection with the respective rights of a principal and a third party. *See, e.g., Illinois Controls, Inc., supra.* The doctrine also applies, however, in determining the respective rights of a principal and his agent:

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[12] The principle is expressed in the familiar maxim: "*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*" *See State v. Buttles' Ex'r*, 3 Ohio St. 309, 321 (1854) (citing *Story on Agency* § 239).

> Where the agent's general authority is such that the principal is bound by the contract, he may hold the agent liable for improperly making it; but by his subsequent action he may approve or ratify the agent's conduct. In that case, the ratification has no effect on the rights and liabilities of the third person, *but it does free the agent from liability to his principal.*

Williston on Contracts § 8:42 at 632-33 (4th ed.).[18]

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[18] It has similarly been stated:

> The ratification or other affirmance by the principal of an unauthorized act done by an agent acting in excess of his power to bind the principal *releases the agent from liability in damages to the principal* for having violated a duty to him, except when the principal:
>
> (a) is obliged to affirm the act in order to protect his own interests; or
>
> (b) is caused to ratify by the misrepresentation or duress of the agent.

Restatement (Second) of Agency § 416 (1958) (emphasis added).

Ratification affects not only the rights of the principal against the agent, but also the rights of the agent to compensation:

> Upon ratification, an agent or other person who without power to bind the principal, has purported to do so is entitled to the same rights against the principal as if the act had been authorized, unless the principal:
>
> (a) is induced to affirm by the misrepresentation of the agent; or
>
> (b) is obliged to affirm in order to protect his own interests.

Restatement (Second) of Agency § 462 (1958).

Ohio courts have not adopted, or rejected, § 416 or § 462 of the Restatement (Second) of Agency. Ohio courts have, however, looked to the Restatement in determining other agency issues. *See, e.g., Illinois Controls, Inc.*, 70 Ohio St.3d 512 (1994) (adopting § 84, cmt. d, § 104, and § 326 of the Restatement (Second) of Agency in syllabus ¶¶ 3 and 4).

Moreover, Ohio recognizes the doctrine of substantial performance, and has applied it to contracts for attorneys' services.

> An attorney who substantially performs under the contract may be entitled to the full price of the contract in the event

Ohio law recognizes the applicability of doctrine of ratification to an unauthorized settlement procured by an attorney:

> It is true that an unauthorized settlement or contract executed by an attorney may be ratified by his client. Ratification may be implied from the fact that the client accepted the fruits of the settlement or contract with knowledge thereof or from the client's negligence, inaction, or apparent acquiescence in the settlement. 7 American Jurisprudence 2d 128, Attorneys at Law, Section 127. See *Weatherhead v. Ettinger, supra* (78 Ohio St. 104).

Morr v. Crouch, 19 Ohio St. 2d 24, 29 (1969). In *Morr*, the Ohio Department of Natural Resources sought to appropriate real property from Ruth E.M. Crouch, the sole owner of the land in fee simple. The matter was purportedly settled in probate court. Ruth Crouch, however, did not participate in the settlement negotiations. Rather, Crouch's husband and her lawyer reached a settlement with the State without her knowledge. The probate court entered a "Journal Entry—Settlement" signed by the assistant Ohio attorney general, and by Ruth Crouch's attorney over the words "Accepted by/for landowners." The title of the real property was transferred to the State pursuant to the journal entry.

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of discharge "on the courthouse steps," or prior to settlement. *See Kaushiva v. Hutter* (D.C. App. 1983), 454 A.2d 1373; *MacInnis v. Pope* (1955), 155 Cal. App.2d 528, 285 P.2d 688. *Fox & Associates, Co., L.P.A. v. Purdon*, 44 Ohio St.3d 69, 72 (1989). ACC contends that because it had already discharged Vorys, the doctrine of substantial performance does not apply. The purported "cause" was that Vorys entered into the settlement with USX without authority to do so. Since the Court finds that as a matter of law ACC ratified the settlement, ACC's "cause" argument must also fail: the ratification precludes ACC from asserting that Vorys acted without authority.

Nineteen months later, Ruth Crouch moved to vacate the journal entry, asserting that she was not present at the settlement conference, that she had not authorized her husband to settle the matter, and that the settlement was entered without her consent. The trial court denied her motion to vacate. The court of appeals reversed. The Ohio Supreme Court affirmed the judgment of the court of appeals, holding that in the circumstances Ruth Crouch's failure to act during the nineteen months after the unauthorized settlement did not constitute a ratification. *Morr,* 19 Ohio St. 2d at 29-30 ("Nineteen months is not an unreasonable length of time to disaffirm where the landowner had no actual notice of the transfer of title and accepted no benefits from the unauthorized act.").

Although *Morr* is not directly on point, two of the principles set forth in *Morr* apply to the instant case. First, the court in *Morr* stated that a client may ratify an unauthorized settlement executed by an attorney. 19 Ohio St. 2d at 29. Second, if the client has accepted the fruits of the settlement with knowledge thereof, the client has ratified the settlement. *Id.*

The parties do not seem to draw a distinction between express and implied ratification. The Court, however, finds that the difference is of some significance in its analysis of this case. First, Vorys argues that ACC ratified the settlement when Silverthorn, Sr. executed the written settlement agreement on December 9, 1993. Vorys also contends that ACC again ratified the settlement when its individual shareholders executed individual releases in response to USX's demand on December 10, 1993. These are acts of express ratification. Indeed, it is difficult to imagine a clearer example of ratification than an execution of releases by all individual shareholders. *See Campbell,* 24 Ohio St. 3d at 57.

Second, both elements of implied ratification are present in this case. Although the parties dispute certain details

about what was said and who said it, the operative facts of this case are beyond dispute. In particular, it is beyond dispute that ACC accepted the sizable fruits of the $103.75 mililon settlement. As a matter of law, the element of acceptance of benefits is satisfied.

Furthermore, it is clear that ACC had full knowledge of all material facts when it accepted the benefits of the settlement. By the time ACC received the proceeds of the settlement, Silverthorn, Sr. knew that Vorys had acted beyond the scope of its authority by entering into the settlement. Silverthorn, Sr. was also fully aware of the terms of the settlement.

ACC argues, *inter alia,* that Vorys is not entitled to summary judgment because Vorys was clothed with apparent authority, and as a result ACC was bound by the settlement. ACC couches its arguments in various terms, including lack of knowledge, lack of voluntariness, misrepresentation, and duress. The Court, however, finds that ACC's ultimate ratification of the $103.75 million settlement subsumes ACC's apparent authority argument. Under Ohio law, ratification may occur even where apparent authority existed. *See Chase Bank of Ohio v. Mentor Food Mart,* No. 90-L-14-055, 1991 WL 117011 at *5-6 (Ohio App. June 28, 1991) (court assumed lack of apparent authority in examining ratification, but held that principal had clothed agent with apparent authority *and* had ratified the transaction).

On a more central plane, ACC's argues that it had no choice but to affirm the settlement with USX because it was already bound to do so. ACC's argument is flawed. First, it is doubtful that the kind of duress contemplated by Restatement (Second) of Agency §§ 416(a) or 463 (a) is satisfied by the existence of a settlement made bind-

ing by apparent authority.[14] Nor is the Court persuaded that advice concerning the binding effect of the settlement constituted a misrepresentation for purposes of §§ 416(b) or 463(b).

ACC stood to lose nothing by attempting to repudiate the settlement. If it resisted the settlement and lost, it would have been no worse off than it was by affirming the settlement: it would have had a $103.75 million settlement. If ACC resisted the settlement agreement and won, it could presumably have renegotiated the settement, or it could have allowed this Court to reach the merits of the confirmation action and waited for the inevitable appeal to the Sixth Circuit Court of Appeals. Neither scenario constitutes palpable harm to ACC's interests.

From a policy and fairness standpoint, ACC's argument would have the Court turn the law of ratification on its head. The concept underlying ratification is that a principal cannot on the one hand knowingly accept and retain the benefits of a transaction but on the other hand complain that the transaction was unauthorized.

For the above reasons, the Court rejects ACC's arguments that ACC's affirmation of the settlement was forced and therefore did not constitute ratification. The Court finds as a matter of law that ACC both expressly and impliedly ratified the alleged unauthorized settlement agreement with USX. As a result, Vorys is entitled to summary judgment in its favor on its claims and on ACC's counterclaims.[15]

VI.

Based on the above, the Court GRANTS Vorys' summary judgment motions. The Clerk shall enter a final judgment in this case, in Vorys' favor, and against ACC,

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[14] *See* footnote 13, *supra*.

[15] ACC's ratification is dispositive; the Court therefore finds it unnecessary to address Vorys' waiver theory.

dismissing ACC's counterclaims with prejudice, and granting Vorys the following relief:

1. A judgment declaring that Vorys was entitled to receive and retain its contractual contingent fee from the Energy Buyers settlement with USX; and

2. An award of the sum of $2,187,500 as the portion of the contingent fee which has not been paid, plus interest thereon, including prejudgment interest at a rate of 10% per annum calculated from December 9, 1993.[16]

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH
Judge
United States District Court

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[16] The plain language of the fee agreement gives Vorys the right to a contingent fee on any amount recovered in connection with the arbitration.

APPENDIX D

[Filed May 9, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-95-636
JUDGE SMITH
Magistrate Judge Kemp

VORYS, SATER, SEYMOUR and PEASE,
Plaintiff,

-v.-

AMERICAN CITIGAS COMPANY,
Defendant.

ORDER

The Court issued a final judgment in this case on April 26, 1996. Defendant American Citigas Company ("ACC") asserted that plaintiff committed malpractice by negotiating a $103.75 million settlement in ACC's favor. The Court granted summary judgment in plaintiff's favor, finding that ACC had ratified the settlement as a matter of law. ACC immediately sought an expedited appeal from the Court's April 26, 1996 judgment. ACC now moves this Court to alter and amend a portion of the Court's final judgment under Fed. R. Civ. P. 59(e) and/or to fix terms for a supersedeas bond on appeal.

ACC moves for reconsideration of the portion of the Court's judgment that awarded plaintiff $2,187,500 plus interest representing plaintiff's contingency fee on the part of the settlement plaintiff negotiated for ACC which obli-

gated USX to pay ACC $8.75 million in matching charitable contributions. The Court finds that ACC's motion is based on allegations and arguments that could have been, but were not, presented in ACC's responses to plaintiff's summary judgment motions. In particular, ACC did not present *evidence* in connection with its responses to show that it had received only a portion of the $8.75 in matching charitable contributions, though it easily could have done so.[1] *See Keweenaw Bay Indian Community v. Michigan*, 152 F.R.D. 562, 563 (W.D. Mich. 1992), *aff'd*, 11 F.3d 1341 (6th Cir. 1993). The Court therefore DENIES ACC's motion to alter or amend.

Under Fed. R. Civ. P. 62(d), a party appealing a monetary judgment may obtain a stay of judgment pending appeal upon approval of the supersedeas bond by the district court. *See* 11 Charles A. Wright, Arthur R. Miller, and Mary K. Kane, *Federal Practice and Procedure* § 2905 at 518-26 (1995). The Court therefore GRANTS ACC's motion to set supersedeas bond and to stay pending appeal. The amount of such a bond is usually set at the amount necessary to satisfy the judgment in full. *Id.* at 522; *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 873 (10th Cir. 1986). ACC shall post a bond sufficient to satisfy the entire amount of $2,187,500 plus interest. Upon the filing of such a supersedeas bond, a stay will be in effect. Fed. R. Civ. P. 62(d).

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, Judge
United States District Court

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[1] Moreover, ACC certainly received something of value when, on December 9, 1993, USX promised to pay ACC $8.75 million in matching charitable contributions, regardless of when the contributions were actually made.

APPENDIX E

[Filed Jul. 14, 1997]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-3481

VORYS, SATER, SEYMOUR & PEASE,
Plaintiff-Appellee,

v.

AMERICAN CITIGAS COMPANY,
Defendant-Appellant.

ORDER

BEFORE: SILER and BATCHELDER, Circuit Judges; and HULL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

(2)

No. 97-640

Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICAN CITIGAS CO.,
Petitioner,

v.

VORYS, SATER, SEYMOUR AND PEASE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether, in the particular circumstances of this case, the district court abused its discretion when it exercised jurisdiction over a lawsuit seeking more than $2.1 million in money damages as well as a declaration of rights.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties. Petitioner American Citigas Co. was the defendant in the district court; respondent Vorys, Sater, Seymour and Pease was the plaintiff.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Vorys, Sater, Seymour and Pease states that it is a partnership and has no parent companies or subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-640

AMERICAN CITIGAS CO.,
Petitioner,

v.

VORYS, SATER, SEYMOUR AND PEASE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

This case does not present the question stated in the petition for certiorari, and the Sixth Circuit's unpublished opinion does not implicate any circuit split. Here, the law firm of Vorys, Sater, Seymour and Pease ("Vorys") sought and won not only a declaration of its right to retain legal fees that it had already collected, but also a money judgment of more than $2.1 million in fees that remained unpaid. No circuit in the country would have held that the district court abused its discretion when it exercised the diversity jurisdiction conferred upon it by Congress and the Constitution. Even the Fifth and Ninth Circuits, on which the petition's claim of a circuit split rests, have made clear that when a plaintiff is seeking not only declaratory relief but also damages in an amount sufficient to provide an independent basis for diversity jurisdiction, the district court has a virtually unflagging obligation to exercise its

jurisdiction despite the pendency of parallel state proceedings. *See, e.g., Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1421 (9th Cir. 1997); *Southwind Aviation v. Bergen Aviation*, 23 F.3d 948, 951 (5th Cir. 1994).

Even if Vorys really had brought a pure declaratory judgment action and had not been seeking contract damages, this case still would not have implicated any circuit split over the proper application of *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). Although petitioner American Citigas Company ("ACC") incorrectly asserts that the Fifth and Ninth Circuits generally forbid district courts to exercise diversity jurisdiction over pure declaratory judgment actions when parallel actions are pending in state court, *Wilton* and the text of the Declaratory Judgment Act give district courts "unique and substantial discretion" in this regard. *Id.* at 286. ACC does not cite a single Fifth Circuit case that post-dates *Wilton*, and the Fifth Circuit recently noted that "[a] district court has broad discretion to retain or dismiss a declaratory judgment suit where a parallel state court suit has been filed." *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir.), *cert. denied*, 118 S. Ct. 69 (1997). As for the Ninth Circuit, the line of cases cited by ACC is confined to insurance disputes, which raise special issues under the McCarran-Ferguson Act; in any event, the Ninth Circuit is taking steps to reconsider that line of cases *en banc*.

Finally, even if the Ninth Circuit were willing to apply its panel decisions to *all* declaratory judgment actions (rather than just to cases seeking coverage opinions or raising other questions of insurance law), and even if this case really were a declaratory judgment action, the Ninth Circuit's decisions specifically acknowledge that the circumstances of any particular case may warrant the exercise of federal jurisdiction. *See, e.g., Employers Reins. Corp. v. Karussos*, 65 F.3d 796, 798 (9th Cir. 1995); *cf.* Pet. i (conceding that "extraordinary circumstances"

will justify the exercise of jurisdiction). Here, the district court expressly found "unique circumstances" justifying its exercise of jurisdiction. Pet. App. 23a. ACC is therefore reduced to attacking the factual basis for the district court's finding. *See, e.g.*, Pet. 7-8. The record amply supports the district court's finding of "unique circumstances" making this case appropriate for resolution in federal court,[1] and the accuracy of that finding is not a cert-worthy issue.

COUNTERSTATEMENT OF THE CASE

In 1991, ACC—then a small Ohio corporation called Energy Buyers Service Corporation—asked Vorys to represent it in a pending arbitration proceeding against the mammoth USX Corporation. Sixth Circuit Joint Appendix ("C.A. App.") 270. Vorys agreed to represent ACC on a contingency-fee basis. The letters setting forth the agreement between Vorys and ACC called for Vorys to receive roughly 25% of any "recovery" on the claim that had been submitted to arbitration, and expressly indicated that Vorys would receive its contingent fee for "any payment on or attributable to" that claim. *Id.* at 133.

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[1] Relevant considerations include the following: (1) the parties' dispute grew out of Vorys's representation of ACC in proceedings before the federal district court and concerned the proper allocation of settlement proceeds that had been distributed under the district court's supervision; (2) although ACC had secretly filed (but not served) an action in Texas state court the day before Vorys sought to invoke federal jurisdiction, ACC initially concealed this action from both Vorys and the district court; (3) Texas had little connection to the dispute between ACC and Vorys, which was governed by Ohio law; (4) no parallel or related proceeding had ever been filed in the courts of the state whose law was at issue; (5) it is unclear whether the Texas courts even had personal jurisdiction over Vorys; and (6) even if ACC's Texas action technically commenced on the day of its filing (which is unclear in light of the lag in service), the Texas action had been "virtually inactive since it was filed," Pet. App. 21a, and in realistic terms the federal court was far ahead on the learning curve.

In proceedings held in Columbus, Ohio, the arbitrator found USX liable to ACC, and in December 1992 he awarded ACC the principal sum of $116,807,768. *Id.* at 274-275. On behalf of ACC, Vorys filed and briefed an action in the United States District Court for the Southern District of Ohio to confirm the arbitral award. *See* 9 U.S.C. § 9. Unbeknownst to Vorys, however, ACC's president—Robert Silverthorn, Sr.—was already considering ways to try to avoid paying Vorys its full contingent fee. Only six weeks after Vorys had won the largest award in American Arbitration Association history for his previously impecunious company, Silverthorn indicated to his son that he was thinking about discharging Vorys. In a contemporaneous memo, Silverthorn's son—who was himself a lawyer and who served as ACC's general counsel—described his reaction:

> I remained silent so as not to engage in a heated exchange on the way to the airport. I have steadfastly taken the position with Dad that VSSP is entitled to their 25% and no contribution should be asked from them with regard to any expenses that VSSP must absorb with regard to any other claim. I feel that Dad is absolutely without legal or moral support for this position and it is an embarrassment to me for him to be pursuing this kind of illogic.

C.A. App. 979.

Meanwhile, Vorys was diligently litigating the federal action to confirm the arbitration award. Confirmation was not certain, because the enormous award "could fairly be characterized as a windfall." Pet. App. 27a. In October 1993, John Elam—Vorys's most senior trial lawyer—presented oral argument in favor of confirmation. C.A. App. 277. With ACC's express authorization, Elam subsequently entered into settlement negotiations with Dan Sandman, USX's general counsel. *Id.* at 1006.

Elam was scheduled to meet with Sandman on November 23, 1993. On November 22, 1993, Elam and John

Keller (another Vorys lawyer) had a long meeting with Silverthorn and his wife. The outcome of the meeting is disputed. Elam and Keller state that Silverthorn expressly authorized Elam to offer a $103.75 million settlement, under which USX would pay ACC $95 million on December 23, 1993, and would make an additional $8.75 million in matching charitable contributions at ACC's direction. *Id.* at 636, 714. Silverthorn claims that he merely authorized Elam to try to induce USX to make such an offer. *Id.* at 1012.

At their meeting the next day, Elam and Sandman reached an agreement in principle to settle the case on these terms. Elam called Silverthorn from the airport to relay the good news. Silverthorn expressed displeasure that USX had agreed to back its payment obligations with a confession of judgment rather than a letter of credit. Pet. App. 29a; C.A. App. 672, 324. That evening, Silverthorn faxed Elam a one-sentence letter (which Silverthorn himself did not sign) stating that Elam had acted without authority and "had better undo" the deal. *Id.* at 677.

Rather than simply scuttling an authorized $103.75 million deal on the strength of this terse and inaccurate fax, Elam and Keller sought to discuss the matter with Silverthorn, but he went incommunicado. *Id.* at 281, 323-331. In the meantime, USX's lawyers sent Vorys a draft of a proposed written settlement agreement. Vorys and Silverthorn's son (who was also acting as counsel for ACC) commented upon and exchanged several drafts with USX's lawyers during this period, but USX was aware of the potential problem and knew that any new terms not covered by the November 23 agreement in principle would require ACC's approval. *Id.* at 281, 641, 858, 864, 867.

Ultimately, Silverthorn tried to consummate the extremely favorable settlement while avoiding Vorys's contingent fee. On December 9, 1993, Silverthorn—having

received the most recent version of USX's draft settlement agreement—met with USX's president over lunch. For tax reasons, Silverthorn asked USX to defer the bulk of the $95 million payment until January 3, 1994, which USX agreed to do. Pet. App. 31a. Other aspects of the meeting are disputed, but there is no dispute that Silverthorn eventually shook hands with USX's president on the deal. *Id.* After USX's president left, Silverthorn personally made significant changes to the draft agreement (including striking out entire pages of terms) and then signed it. *Id.*; C.A. App. 1129-1150.

On December 10, 1993, Silverthorn's son and Keller went to Pittsburgh to deliver the executed agreement to USX. Although Silverthorn now claims that he orally discharged Vorys on the evening of December 9, he concedes that his son had his express authority to deliver the agreement and to act as ACC's legal representative in Pittsburgh. *Id.* at 416, 919. At the Pittsburgh meeting, USX announced that it would not proceed with the settlement unless all of ACC's shareholders executed releases of any personal claims that they might have against USX. *Id.* at 922. Silverthorn's son recognized that this demand "created a substantial addition to the terms of the settlement" and gave ACC an opportunity to walk away from the deal. *Id.* at 922-923, 938. The demand "spawned a whole set of telephone calls and exchanges" with his father in Houston, because it "created an opportunity to maybe start all over again." *Id.* at 922. Rather than allowing the potential settlement to founder on USX's demand, however, Silverthorn and ACC's other shareholders provided the requested releases. *Id.* at 924-925, 1155.

On the same day that he and his wife signed the releases demanded by USX, Silverthorn expressly conceded that he was ratifying Vorys's allegedly unauthorized acts. In a letter to Elam, Silverthorn acknowledged ACC's "ratification of the transactions with USX made by you," but asserted cryptically (and erroneously as a matter of law)

that this ratification "does not waive our rights which are preserved under [the agreement letters between ACC and Vorys]." *Id.* at 1158.

The settlement closed on December 14, 1993, when ACC put the releases in escrow and USX paid the first $5 million installment of the settlement amount. Pet. App. 32a. ACC was not quite ready to spring its plot against Vorys, and so ACC promptly gave Vorys written authorization to receive its contingent share of the $5 million. The authorization letter, which Silverthorn himself prepared, calculated Vorys's $1,444,340 share according to the precise terms of the contingent-fee contract. *Id.*

At this time, the confirmation action in the federal district court in Ohio was still pending, because USX's $90 million installment of the settlement amount was not yet due. Still, on December 27, 1993, ACC secretly filed suit against Vorys in Harris County, Texas, seeking a declaratory judgment and unspecified damages. ACC did not serve this suit upon Vorys or otherwise inform Vorys of its existence. But having now prepared for his bid to strip Vorys of its contingent fee, Silverthorn sent Vorys a letter stating that "we are discharging your firm effective immediately." C.A. App. 1178.

The next day, unaware of the unserved Texas action, Vorys moved to intervene in the pending confirmation action to protect Vorys's contingent share of the settlement that was about to end that action. On December 29, 1993, the Ohio district court entered two orders. One, to which ACC consented, granted Vorys's motion for leave to intervene and stated that when USX made its $90 million payment on January 3, 1994, Vorys would receive its $22.5 million contingent share without prejudice to whatever rights (if any) ACC might have against Vorys. *Id.* at 153-155. The other order enjoined Vorys and ACC from commencing or pursuing claims against each other in any other forum. *Id.* at 157. ACC withheld its consent

from this latter order, but it did not inform either the district court or Vorys of the unserved suit in Texas. *See* Pet. App. 32a & n.10.[2] Vorys filed its cross-claim against ACC in the Ohio district court that same day.

At that time, ACC's shareholders had created a new Nevada corporation and were in the process of merging the old Ohio corporation out of existence. But the Ohio corporation did not officially disappear until December 30, 1993—one day after Vorys filed its cross-claim. *Id.* at 203. Almost one year later, in December 1994, ACC filed a motion asking the district court to dismiss the intervention proceeding for want of jurisdiction; although ACC and Vorys had indisputably been of diverse citizenship ever since December 30, 1993, ACC argued that they had not been of diverse citizenship on the day that Vorys filed its cross-claim. On June 22, 1995, after vigorous briefing on both sides, the Ohio district court granted ACC's motion and dismissed Vorys's claims against ACC without prejudice. The district court added that the injunction was void. *Id.* at 201-213.[3]

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[2] ACC now criticizes the district court's order as a violation of the Anti-Injunction Act, 28 U.S.C. § 2283. Because ACC failed to disclose the unserved Texas lawsuit either to the district court or to Vorys, the district court could not possibly have known that any pending state litigation existed. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (Anti-Injunction Act does not bar injunction against the commencement of state proceedings that are not yet pending). In any event, orders entering or refusing to dissolve injunctions are immediately appealable. *See* 28 U.S.C. § 1292(a)(1). Rather than taking an immediate appeal that would have required it to disclose the existence of the Texas lawsuit, ACC sat tight. ACC also waited nearly a year before filing a motion to dissolve the injunction.

[3] Meanwhile, in January 1995, Vorys had been served with a Plea in Intervention by a person seeking to become a party to the Texas state-court lawsuit. Thirty days later, Vorys removed the Texas action (which still had not been formally served) to federal district court. But on May 5, 1995, the Texas federal court remanded the action back to state court on the grounds that Vorys's

The very next day, Vorys refiled its claims against ACC as an independent action in the Ohio district court. Vorys's complaint sought both compensatory damages and a declaratory judgment. In particular, Vorys sought (1) a money judgment in the amount of more than $2.1 million, representing the unpaid fee on the $8.75 million in matching funds that USX had agreed to put at ACC's disposal, and (2) a declaration that Vorys was entitled to retain the legal fees that it had already received in connection with USX's $90 million payment to ACC. *Id.* at 15-16.

Vorys's complaint was assigned by lot to Chief Judge Holschuh of the Southern District of Ohio. But after ACC asked Judge Holschuh to recuse himself, the action was transferred to Judge Smith, who had handled the confirmation proceeding (and who had ruled in ACC's favor in dismissing Vorys's intervention case).

ACC subsequently moved to dismiss or stay Vorys's Ohio lawsuit in favor of the Texas action. In a thoughtful and well-reasoned opinion, Judge Smith denied this motion. Pet. App. 11a-24a. The district court found that under the "unique circumstances" of this case, "exercise of jurisdiction over this case by this Court will not offend principles of federalism or comity, nor would it constitute gratuitous interference with the state court proceedings." *Id.* at 23a. Pointing out that he "ha[d] dealt with this case from the filing of the confirmation action in December 1992 until the present day," Judge Smith noted the close relationship between Vorys's stand-alone action and the claims that Vorys had attempted to assert in the confirmation action. Although Judge Smith had ultimately held that he lacked jurisdiction to adjudicate Vorys's claims in the confirmation action, "in reaching that con-

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removal had been untimely. Thus, contrary to ACC's suggestion, *see* Pet. 23, Vorys's attempt to remove the federal action occurred well before the Ohio district court dissolved the injunction and dismissed Vorys's intervention case. Vorys's removal efforts did nothing to delay the Texas action.

clusion the Court had occasion carefully to examine and become familiar with the claims Vorys asserts in the instant case." *Id.* at 21a-22a. The Court was also "well-acquainted with the underlying dispute as well as the controversy surrounding the settlement, Vorys' representation, and attorneys' fees." *Id.* at 21a. The "considerable resources" that the Court had already expended on the case "would be largely wasted were it to defer to the Texas state court in this matter." *Id.* By contrast, "[t]he Texas state court case has been virtually inactive since it was filed"; one judge had recused himself, and the new judge "has done nothing more than set the matter for trial by a standard administrative order." *Id.*

Aside from these considerations of judicial economy, the Ohio district court noted that this case concerned the professional conduct of Ohio lawyers in connection with the settlement of a case before it. The Ohio district court noted that "this Court has a strong interest in regulating the conduct of attorneys who practice before it," while the Texas state court "has no such interest in the instant case." *Id.* at 22a.

Texas's interest in the case was further diminished by the fact that the governing law came from Ohio rather than Texas. An Ohio district court is in at least as good a position to apply Ohio law as a Texas state court, and Texas has relatively little sovereign interest in enforcing the laws of other states. The district court made crystal clear the attenuated nature of Texas's connection to the dispute between ACC and Vorys:

> The parties were, during the events that led to the present controversy, both citizens of Ohio, although Energy Buyers' principal place of business was in Houston, Texas. The original contract in the underlying dispute was one to supply natural gas to USX Corporation's facilities at Lorain, Ohio and Haverhill, Ohio. The agreement provided that it was to be construed according to Ohio law, and provided for arbitration in Columbus, Ohio. Energy Buyers re-

> tained an Ohio law firm, Vorys, to represent it in the arbitration that took place in Ohio. Vorys' representation of Energy Buyers before this Court occurred in Ohio. The settlement of the underlying action was consummated in Ohio on January 3, 1994.

Id. Indeed, Texas's connection with the case was so attenuated that there was a significant question as to whether the Texas courts could even exercise personal jurisdiction over Vorys. *Id.*[4] By contrast, there was no question about the Ohio district court's jurisdiction. As for ACC's accusations of forum shopping, the district court tactfully noted that ACC's own efforts to litigate an Ohio dispute in Texas could be construed as "a precipitous race to the courthouse to avoid this Court's jurisdiction." *Id.* at 23a.

After the district court denied ACC's motion to dismiss or stay Vorys's action, ACC filed a counterclaim against Vorys. ACC sought a declaratory judgment of its own (suggesting that this case was indeed fit for federal declaratory relief) as well as a money judgment of more than $90 million. C.A. App. 395-411.

In September 1995 (before the district court ruled on the motion to dismiss or stay), Vorys had filed a motion for summary judgment on its own claims. On February 14, 1996, it filed a similar motion for summary judgment on ACC's counterclaim. These motions were fully briefed and ready for decision by March 21, 1996. Meanwhile, trial in the Texas state court was not scheduled to begin until June 1996.

On April 22, 1996, the Texas court issued a most peculiar order. The order stated that although the Texas

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[4] The petition incorrectly states that the Texas trial court had already issued an interlocutory order stating that it did have personal jurisdiction over Vorys. Pet. 8. The Texas trial court did not find personal jurisdiction until *after* the Ohio district court had decided not to dismiss or stay Vorys's suit.

court would not be able to begin jury selection until June 18, 1996, the case would nonetheless "be considered 'in trial' as of May 3, 1996." C.A. App. 612. The Ohio district court, which had previously ordered the parties to keep it apprised of developments in Texas, learned of this order on April 24, 1996. *Id.* at 610-611. One day later, it issued a long and carefully reasoned opinion—which it had obviously been working on for some time—granting Vorys's motion for summary judgment. Pet. App. 25a-42a.

The court held that even if one resolved all genuine factual disputes in ACC's favor, ACC had ratified Vorys's allegedly unauthorized conduct. Consistent with the Restatement (2d) of Agency, the court further concluded that under Ohio law, ACC could not ratify the settlement as to USX without also ratifying it as to Vorys; subject to certain exceptions that were not applicable here, ratification frees agents from liability to their principal and entitles them to the same rights against the principal as if their acts had been authorized. *Id.* at 37a & n.13. The court therefore granted the declaratory relief that Vorys had sought.

As for Vorys's claim for a money judgment, Vorys had argued that the term "recovery" in the parties' contract should be interpreted to include the $8.75 million in matching charitable contributions that USX had agreed to make at ACC's direction. ACC had not challenged this argument in its briefs, and the district court agreed with Vorys that under the plain language of the contract, ACC still owed Vorys $2,187,500. The court entered final judgment in that amount, and also awarded Vorys the prejudgment interest that it had sought. *Id.* at 42a. ACC subsequently sought reconsideration on these points, but the district court properly rejected ACC's belated (and meritless) arguments. *Id.* at 44a.

In an unpublished opinion, a panel of the United States Court of Appeals for the Sixth Circuit unanimously af-

firmed the district court's judgment. The Sixth Circuit devoted the bulk of its opinion to ACC's arguments on the merits, which ACC has elected not to press before this Court. *See id.* at 6a-10a. With respect to whether the district court should have exercised its undisputed jurisdiction in the first place, the Sixth Circuit simply stated that under the particular facts of this case, the district court did not abuse its discretion. *Id.* at 5a-6a. ACC subsequently sought rehearing *en banc* on various issues, but no judge even called for a vote on this suggestion. *Id.* at 45a.

REASONS FOR DENYING THE PETITION

In arguing that the district court should have abstained from this "declaratory judgment action," the petition wholly ignores the fact that Vorys sought (and won) *both* declaratory relief *and* contract damages. Under the circumstances, no circuit in the country would have held that the district court abused its discretion when it elected to hear Vorys's case.

I. BECAUSE OF THE PARTIES' COMPETING CLAIMS FOR MONETARY DAMAGES, THIS CASE DOES NOT PRESENT THE QUESTION STATED IN THE PETITION.

The general rule "is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.' " *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" by Congress and the Constitution, and only "the clearest of justifications" will warrant abstention. *Id.* at 817-819.

In *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), this Court acknowledged a narrow exception to *Colorado River* for "actions brought under the Declaratory Judg-

ment Act, 28 U.S.C. § 2201(a)." *Id.* at 286. The Court reasoned that the Declaratory Judgment Act is phrased in discretionary terms: it states that federal courts "may" enter declaratory judgments in cases within their jurisdiction. *Id.* Because the language of the Act gives district courts "unique and substantial discretion in deciding whether to declare the rights of litigants," the Court inferred that it must also give district courts broader-than-usual discretion about whether to entertain declaratory judgment actions in the first place. *Id.* at 286-287. As the Court observed, the contrary position "depends on the untenable proposition that a district court, knowing at the commencement of litigation that it will exercise its broad statutory discretion to decline declaratory relief, must nonetheless go through the futile exercise of hearing a case on the merits first." *Id.* at 287.

Wilton is a perfect example of an "action[] brought under the Declaratory Judgment Act." In *Wilton*, the plaintiff insurers had no claims against their insured, but simply wanted a declaration that the insured had no valid claims against them. Without the Declaratory Judgment Act, they could not have brought suit in federal court, because they could not have asserted any cognizable claim for relief.

By contrast, Vorys's suit would have been in federal court with or without the Declaratory Judgment Act. Vorys was seeking (and won) not only a declaration of its right to retain the fees that it had already collected, but also a sizable award of contract damages for fees that were owed but remained unpaid.[5] Because ACC and

[5] Aware that this fact is fatal to its petition, ACC tries to rewrite history. ACC never mentions that Vorys's suit sought millions of dollars in contract damages. Instead, ACC repeatedly (and falsely) portrays Vorys's suit as a pure declaratory judgment action. *See, e.g.*, Pet. 3 ("Vorys Sater brought a declaratory judgment action in federal district court in Ohio, requesting a declaration that it was not liable to CitiGas and was permitted to retain its $22.5 million contingent fee."). The petition even portrays the district court's

Vorys were of diverse citizenship, there is no question that Vorys could have sued ACC in federal court for $2,187,500 plus accumulated interest. *See* 28 U.S.C. § 1332 (establishing, at the time of Vorys's suit, a $50,000 jurisdictional amount for diversity cases). There is also no question that the district court would have had a "virtually unflagging obligation" to exercise its jurisdiction over such a suit, despite the pendency of the Texas proceedings. *Colorado River*, 424 U.S. at 817.

The mere fact that a complaint includes a claim for declaratory relief does not transform a case from one that the federal courts have a "virtually unflagging obligation" to hear into one that they have broad discretion to dismiss or stay. To the contrary, in *Colorado River* itself the United States was seeking a declaration of its rights (pursuant to the Declaratory Judgment Act) along with the additional relief of an injunction and the appointment of a water master. *See id.* at 805; *Wilton*, 515 U.S. at 283-284. Because the United States could have sought this additional relief in federal court with or without the Declaratory Judgment Act, *Colorado River* was not an "action[] brought under the Declaratory Judgment Act" within the meaning of *Wilton*. *See Wilton*, 515 U.S. at 286.[6]

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award of $2,187,500 plus prejudgment interest as some sort of gratuitous comment in a footnote, rather than a money judgment on an issue that Vorys had pleaded and argued. *See* Pet. 9. The record, of course, belies ACC's attempt at spin control.

[6] For the sake of internal consistency, ACC is forced to ignore *Wilton*'s express observation that *Colorado River* did not involve an "action[] brought under the Declaratory Judgment Act." *See* Pet. 13 (describing *Colorado River* as "a declaratory judgment action"). To explain the fact that the district court had a "virtually unflagging obligation" to exercise jurisdiction in *Colorado River*, ACC stresses that jurisdiction rested on 28 U.S.C. § 1345 (which gives the district courts original jurisdiction over suits commenced by the United States) rather than 28 U.S.C. § 1332 (which gives the district courts original jurisdiction over suits commenced between diverse parties). ACC does not even attempt to explain why this distinction should make a difference.

Under the *Colorado River* test, the district court had a "virtually unflagging obligation" to entertain both Vorys's claim for $2.1 million in contract damages and ACC's counterclaim for $90 million. The district court awarded Vorys the full amount that ACC still owed, and it dismissed ACC's counterclaim on the merits.

By virtue of the Declaratory Judgment Act, the district court did enjoy extra discretion over whether to grant Vorys the *additional* relief of a declaration stating Vorys's right to retain the fees that Vorys had already received. But since the district court had to resolve the parties' competing claims for monetary relief anyway, there would have been little point in withholding a declaratory judgment. In fact, the district court's disposition of the parties' competing monetary claims—a disposition that ACC does not ask this Court to review on the merits—effectively moots any question about whether the district court should have abstained from entering declaratory relief. With or without a declaratory judgment, the district court's decision to award Vorys $2,187,500 and to reject ACC's counterclaims would have had *res judicata* effects in Texas.

Both the Fifth and the Ninth Circuits—on which ACC's claims of a circuit split rest—have endorsed this analysis. In *Polido v. State Farm Mutual Automobile Insurance Co.*, 110 F.3d 1418 (9th Cir. 1997), the plaintiff had originally sought both a declaratory judgment and monetary relief. The Ninth Circuit expressly stated that the district court had a virtually unflagging obligation "to exercise its jurisdiction over the *monetary* claims exceeding $50,000 in Celeste Polido's complaint against State Farm." The Ninth Circuit added that if Polido had not voluntarily dismissed her monetary claims, "a proper concern for judicial economy would have weighed in favor of the district court's exercise of its discretionary jurisdiction over the state law claims for declaratory relief." *Id.* at

1421.[7] The Ninth Circuit has followed the same analysis in counterclaim situations, when one party seeks purely declaratory relief but the other party seeks money dam-

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[7] In its recent unpublished opinions, the Ninth Circuit has repeatedly echoed this analysis. *See Polonitza v. Chubb Group of Ins. Cos.*, 1997 WL 367926 (9th Cir. July 2, 1997) ("The Polonitzas' original complaint included claims for monetary relief, over which the district court was obliged to exercise diversity jurisdiction. Because those claims would have required the district court to resolve the same state law coverage issues, the district court's decision to exercise jurisdiction over the declaratory relief claim was clearly appropriate."); *Ark Telecommunications, Inc. v. State Farm Fire & Cas. Co.*, 1997 WL 355891 (9th Cir. June 27, 1997) ("Although a district court has discretion to decline to hear declaratory relief claims, it has no discretion to decline claims for monetary relief. Because the district court in this case had to retain appellee's claims for monetary relief, it had an obligation to retain the declaratory relief claims."); *Smith Mailer Mfg. v. Liberty Mut. Ins. Co.*, 1997 WL 407862 (9th Cir. July 21, 1997) (same).

The Ninth Circuit's earlier treatment of contribution claims raised by insurance companies is not to the contrary. In *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995), Employers Reinsurance Corporation (ERC) sued both its insured and Transamerica Insurance Company in federal district court. As far as the insured was concerned, ERC's claims were purely declaratory: ERC was seeking a declaratory judgment stating that it had no duty to defend its insured in some state-court litigation. If the district court disagreed with it on this point, however, ERC wanted (1) a declaratory judgment stating that Transamerica was also obliged to defend the insured and (2) an order requiring Transamerica to contribute to the defense costs being incurred by ERC. The Ninth Circuit held that this contingent request for contribution did not make the lawsuit "one for a money judgment rather than declaratory relief." *Id.* at 801. After all, "[t]he complaint asks the district court to rule on a request that Transamerica pay its share of defense costs only if it first declares that ERC has a duty to defend Karussos." *Id.* Without the Declaratory Judgment Act, ERC could not have brought its claim for monetary relief in federal court, because it did not actually think that Transamerica owed it any money; if ERC indeed had no duty to defend its insured, then it had no claim against Transamerica. *Cf. Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750 (9th Cir. 1996) (applying *Karussos* to another insurance case that included a contribution claim of unspecified amount).

ages. *See, e.g., Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991). In the present case, of course, *both* the plaintiff and the defendant were seeking money damages far in excess of the jurisdictional amount for diversity cases.

The Fifth Circuit has also rejected ACC's position. In *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948 (5th Cir. 1994), the plaintiff sought both declaratory relief and damages. Although the district court characterized the plaintiff's suit as a "declaratory judgment action," the Fifth Circuit held that this characterization was wrong as a matter of law. Because the plaintiff had requested not only a declaratory judgment but also "coercive remedies for the breach of contract in the form of damages, attorney's fees, and injunctive relief," the district court had a "virtually unflagging obligation" to exercise jurisdiction over the plaintiff's suit. *Id.* at 951 (quoting *Colorado River*).

If anything, then, the standard applied by the district court in this case was too favorable to ACC. The district court had a "virtually unflagging obligation" to decide the parties' competing claims for monetary relief, and no circuit in the country would have held that it abused its discretion when it also decided their competing claims for declaratory relief.

II. EVEN IF THIS CASE *WERE* A PURE DECLARATORY JUDGMENT ACTION, IT STILL WOULD NOT IMPLICATE ANY CIRCUIT SPLIT.

Even if Vorys had been proceeding solely under the Declaratory Judgment Act and had not sought $2.1 million in money damages, and even if ACC had not filed its own counterclaims for money damages, this case still would not have implicated any circuit split. Only two-and-a-half years ago, this Court—following the plain language of the Declaratory Judgment Act—held that the Act gives federal courts "unique and substantial discretion in deciding whether to declare the rights of litigants."

Wilton, 515 U.S. at 286-287 (noting "the statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest"). The Court added that district courts are in the best position to decide whether to entertain a declaratory judgment action, because the relevant facts "are peculiarly within their grasp." *Id.* at 289.

ACC suggests that the Fifth and Ninth Circuits nonetheless enforce a strong presumption against entertaining any case in which (1) the federal complaint asks for a declaration of rights (regardless of whether it also seeks other relief), (2) a parallel complaint was filed in a state court before the federal complaint (regardless of whether the federal court has dealt with a prior incarnation of the case and regardless of the comparative stage of the proceedings when the federal court is asked to defer), and (3) the issues in both proceedings involve state law (regardless of whether they have anything to do with the law of the state in which the parallel proceeding is pending). The cases simply do not support these extravagant claims.

The Ninth Circuit has recognized a rebuttable presumption against exercising diversity jurisdiction over certain declaratory judgment actions involving insurance issues. *See Government Employees Ins. Co. v. Dizol*, 108 F.3d 999, 1012 (9th Cir.) (Schroeder, J., dissenting) (criticizing the Ninth Circuit's "presumption against federal jurisdiction in diversity insurance litigation"), *reh'g en banc granted*, 118 F.3d 661 (9th Cir. 1997).[8] But the Ninth

[8] When the Ninth Circuit granted rehearing in *Dizol* on June 26, 1997, it did not purport to limit its review to any particular issue. Indeed, rather than ordering re-briefing on any particular question, the Ninth Circuit simply directed the parties to submit twenty copies of the original briefs. *See* Order (June 27, 1997). Two weeks before oral argument, the Court directed the parties to be prepared to discuss whether courts must raise the discretionary nature of the Declaratory Judgment Act on their own motion.

Circuit has not applied this presumption outside of the insurance context. *See Employers Reins. Corp. v. Karussos*, 65 F.3d 796, 799 (9th Cir. 1995) (noting that two prior Ninth Circuit cases stating the presumption "involved disputes about insurance coverage, as have most, if not all of the published cases in other circuits in which courts have declined to exercise their jurisdiction over requests for a declaration of state law because of a related state court proceeding").[9] In explaining the presumption, moreover, the Ninth Circuit has stressed arguments that are specific to insurance. *See Karussos*, 65 F.3d at 799 (invoking the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. § 1012(a)); *Polido*, 110 F.3d at 1423 (same); *see also American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1017 (9th Cir. 1995) (noting danger of resolving cases on the undeveloped records common in declaratory insurance actions). Indeed, the Ninth Circuit has indicated that its presumption against diversity insurance litigation is similar to the law applied in the Sixth Circuit, from which this case arises. *See*

Contrary to the petition's suggestion, however, the Court has not stated that it will limit its comments to that issue. *Cf.* Pet. 19 n.24.

[9] The only non-insurance Ninth Circuit case cited by ACC is *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166 (9th Cir. 1997). Contrary to ACC's suggestion, *see* Pet. 19, that decision did not invoke any "presumption" against the exercise of jurisdiction, does not conflict with the decisions of any other circuit, and has no bearing on this case. *Exxon* arose after certain cases pending in state court were improperly removed to federal court. Prior to the removal, the state court had indicated that it might reach a legal conclusion with which the federal district court disagreed. The district court therefore entered a declaratory judgment stating, in effect, that if the actions were ultimately remanded to the state court, legal rulings made by the district court at the summary-judgment stage would nonetheless be binding in the state proceedings. Because federal district courts lack jurisdiction to review the decisions of state courts, the Ninth Circuit held that the district court should not have entered its strange declaratory judgment.

Karussos, 65 F.3d at 799; *Hungerford*, 53 F.3d at 1016-1017.

Even if one really could treat this case as a "declaratory judgment action" despite the parties' competing claims for monetary relief, the Sixth Circuit's unpublished opinion would not conflict with the Ninth Circuit's insurance cases. First and foremost, this case does not involve insurance. Second, even in the insurance context, the Ninth Circuit has not called for federal courts presumptively to defer to *all* pending state proceedings, but only to proceedings in the state whose law is at issue; this case indisputably is governed entirely by Ohio law, and no related proceeding has ever been filed in the Ohio state courts. Third, even under the Ninth Circuit's insurance cases, a district court's decision to exercise jurisdiction is not a ground for reversal when the district court has already rendered final judgment and reached the right answer on the merits. *Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 756 (9th Cir. 1996). Here, the court of appeals concluded that the district court did indeed reach the right answer, and ACC is not seeking review of this conclusion.

As for the Fifth Circuit, ACC does not cite a single post-*Wilton* case from that circuit. Like other courts, the Fifth Circuit has read *Wilton* to mean what it says. In the Fifth Circuit's own words, "[a] district court has broad discretion to retain or dismiss a declaratory judgment suit where a parallel state court suit has been filed. The breadth of this discretion was recently reaffirmed by the Supreme Court in *Wilton v. Seven Falls Co.*" *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir.) (citations omitted), *cert. denied*, 118 S. Ct. 69 (1997). Post-*Wilton* cases from the Fifth Circuit make no mention of any "presumption" against exercising jurisdiction.

ACC's contrary argument rests on a handful of Fifth Circuit cases that all were decided before *Wilton*. *See* Pet. 14-15 n.14. In *Texas Employers' Insurance Asso-*

ciation v. Jackson, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989), an insurance company—dissatisfied with pretrial rulings made by a state court in pending litigation against the company—asked a federal district court to issue an injunction or a declaratory judgment effectively reversing those rulings. *Id.* at 505. The Fifth Circuit held that declaratory judgments should not be used for this purpose. *Id.* at 505-506; *cf. supra* n.9. In subsequent *dicta*, the Fifth Circuit expanded upon this conclusion, while nonetheless refusing to require abstention in the cases at hand. *See Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993); *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993), *cert. denied*, 511 U.S. 1032 (1994). The Fifth Circuit, however, has given no indication that its comments in these cases survive *Wilton*. Even before *Wilton*, moreover, it did not apply these cases when litigants sought damages as well as declaratory relief. *See Southwind Aviation*, 23 F.3d at 951. The "conflict" cited by ACC is entirely imaginary.[10]

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[10] There is a reason why no circuit has adopted the position favored by ACC: that position is clearly wrong on the merits. In an effort to justify its attack on diversity jurisdiction, ACC invokes the "values" underlying 28 U.S.C. § 1446 (which limits the time within which defendants must exercise their power to remove actions from state to federal court) and 28 U.S.C. § 2283 (which limits the power of federal courts to enjoin proceedings that are pending in a state court). But the removal power and the injunction power are far different from the power simply to adjudicate a case or controversy that unquestionably comes within federal jurisdiction. Both the removal power and the injunction power involve the coercive use of federal authority to halt state proceedings. By contrast, Congress has long been content to let federal courts exercise power within their sphere at the same time that state courts are exercising power within their sphere. The mere fact that state courts will give *res judicata* effects to federal judgments (and vice versa) does not violate any principles of federalism. *See, e.g., Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922).

III. THE "UNIQUE CIRCUMSTANCES" OF THIS CASE MAKE IT A PARTICULARLY POOR CANDIDATE FOR CERTIORARI.

Finally, the question raised by ACC makes no difference to the outcome of this case. ACC argues that the district court should have exercised jurisdiction only if it found "extraordinary circumstances." *See* Pet. i. But the district court *did* find such circumstances. *See* Pet. App. 23a (finding that under the "unique circumstances" of this case, "the matter can be addressed more effectively in this Court than in the Texas state court" and the exercise of federal jurisdiction "will not offend principles of federalism or comity").

The circumstances stressed by the district court were fully in keeping with this Court's emphasis on "considerations of practicality and wise judicial administration." *See Wilton*, 515 U.S. at 288. The district court noted that this dispute grew out of the confirmation action over which it had presided. Pet. App. 21a. Likewise, in reaching its decision to rebuff Vorys's first attempt to invoke federal jurisdiction, the district court had necessarily examined the parties' claims. *Id.* at 21a-22a.[11] All in all, the district court had "expended considerable resources on this case," which "would be largely wasted were it to defer to the Texas state court in this matter." *Id.* at 21a. By contrast, "[t]he Texas state court case has been virtually inactive since it was filed." *Id.*[12] Independent of any other consid-

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[11] The petition claims that the Ohio district court should have disregarded the work that it had done in the intervention proceedings, because it ultimately concluded that it lacked jurisdiction over Vorys's claims in those proceedings. But the district court unquestionably had jurisdiction to decide whether it had jurisdiction. In any event, "considerations of practicality and wise judicial administration" certainly did not require the district court to disregard the fact that it was farther along the learning curve than the Texas court.

[12] ACC attributes the inactivity of the Texas case to the injunction that the district court voided in June 1995, six months before

erations, then, the priority factor actually favored the district court's exercise of jurisdiction, because "[i]n realistic terms, the federal suit was running well ahead of the state suit." *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

It is clear, too, that Vorys's invocation of federal jurisdiction was not a reaction to ACC's unserved Texas lawsuit. Vorys had intervened in the confirmation action while ACC was still keeping the unserved Texas suit secret from both Vorys and the district court, and Vorys's standalone action was a continuation of the issues that Vorys had attempted to raise in the confirmation action. *Id.* at 22a.

Other considerations made it far more natural for the dispute between ACC and Vorys to be resolved in the Ohio district court than in the Texas state courts. The dispute concerned the conduct of an Ohio law firm in representing what was then an Ohio corporation in connection with an action pending before the Ohio district court. The dispute was governed entirely by Ohio law, and the Ohio district court had an indisputable interest in policing the conduct of the members of its bar. *Id.* In addition, one of the principal issues concerned the proper allocation of settlement proceeds that had been distributed under the Ohio district court's supervision and order. By contrast, Texas's connection to the dispute was so attenuated that Vorys may not even have been subject to personal jurisdiction there. *Id.*

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the district court commented upon the dormancy of the Texas litigation. But ACC had only itself to blame for the injunction; if it had not concealed the Texas case's existence from the district court, it would not have faced this problem. Even after the district court entered the injunction on December 29, 1993, moreover, ACC was in no hurry to call the unserved Texas case to the court's attention. ACC did not appeal the injunction, and it waited until December 2, 1994, to file a motion asking for the injunction to be dissolved. *See supra* n.2.

Because the district court has already held that this case presents "unique circumstances" justifying the exercise of jurisdiction, ACC is reduced to arguing that the court should have come to different conclusions on the particular record presented here. *See, e.g.*, Pet. 7-8 (erroneously claiming that the Texas case was not so inactive as the district court thought); Pet. 24 (questioning "the district court's supposed familiarity with the underlying issues" and the amount of work that the district court had done on the confirmation case). Such factual issues obviously do not merit this Court's review.

CONCLUSION

ACC suggests that when a federal court is asked to exercise its diversity jurisdiction over a "declaratory judgment action" (which ACC somehow defines to include an action that seeks more than $2.1 million in money damages), the court should apply a one-factor test: if a parallel action in state court was filed before the federal complaint, then the federal court generally has no discretion to hear the case. According to ACC, then, the mere filing of a complaint in any state court effectively enjoins the initiation of separate federal litigation. No circuit in the country has adopted this peculiar rule, and there is no reason for this Court to review the Sixth Circuit's unpublished opinion. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 5, 1997

(3)

Supreme Court, U.S.
FILED
NOV 18 1997
CLERK

No. 97-640

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICAN CITIGAS CO.,
Petitioner,

v.

VORYS, SATER, SEYMOUR & PEASE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the face of a clear conflict among the Circuits, Vorys Sater is forced to concoct a series of meritless obstacles that it hopes will deter this Court's review of the abstention issue squarely presented by this case. But each of the theories on which Vorys Sater rests its opposition is spurious. *First*, contrary to Vorys Sater's principal assertion, no court would have held this suit to be anything other than a declaratory-judgment action for purposes of the *Brillhart/Colorado River* distinction. *Second*, Vorys Sater's efforts to discredit the circuit split described in the petition are wholly insubstantial; they also stand in sharp contrast to its arguments below, in which it asserted that the law in the Sixth Circuit differed from that elsewhere. *See* Pet. 18 & n.23. *Finally*, Vorys Sater's attempt to impugn this case as an inappropriate vehicle for resolving the circuit split is nothing more than a meritless play on words.[1]

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[1] The Brief in Opposition also contains a lengthy "counterstatement of the case" that accomplishes little except to establish that this case is riddled with disputed issues of fact that make summary judgment inappropriate. *See, e.g.*, Br. in Opp. 5 ("The outcome of the meeting is disputed."); *id.* at 6 (referring to letter as "crypti[c]"). The counterstatement also contains several distortions of the record. Although page limitations prevent CitiGas from addressing each such instance, we feel compelled to address one. Vorys Sater wrongly insinuates that CitiGas fired the firm on a pretext as part of a premeditated scheme to deny Vorys Sater its 25% contingent fee. *See* Br. in Opp. 4, 5, 7. But the record item on which Vorys Sater rests this assertion (a memorandum by Robert Silverthorn Jr., to whom Vorys Sater incorrectly refers as CitiGas's "general counsel," Br. in Opp. 4) says something very different from what Vorys Sater tries to make of it. At the time Silverthorn Jr. wrote the memorandum in question, CitiGas had proposed that Vorys Sater content itself with a slightly reduced fee in light of claims made by other attorneys who had represented CitiGas before Vorys Sater (a proposal to which Vorys Sater later offered to agree). As is clear from the face of the memorandum, *see id.* at 4 ("no contribution should be asked from [Vorys Sater] with regard to . . . any other claim"), Silverthorn Jr. expressed disagreement with his father's "position" on *that* issue. To say that the memorandum

1. In arguing that this was not a declaratory-judgment action for abstention purposes, Vorys Sater leads with its chin. Vorys Sater points out that its complaint not only demanded a declaratory judgment permitting it to retain the more than $22 million it had already pocketed but also demanded approximately $2 million in damages. Vorys Sater argues that, in light of its damages claim, the entire lawsuit should be treated as a damages action (subject to *Colorado River*'s presumption in favor of retaining jurisdiction), and not as a declaratory-judgment action (subject to *Brillhart's* presumption against retaining jurisdiction). Vorys Sater would apparently have the Court believe that a declaratory-judgment plaintiff can avoid *Brillhart* by the simple expedient of adding a damages claim, meritorious or not, in the amount of even a peppercorn.[2]

Although Vorys Sater advanced this same argument below, neither the district court nor the court of appeals reached it; instead, both courts properly treated the case as a pure declaratory-judgment action. This Court's usual practice in such circumstances is to address the issue presented in the petition and allow the lower courts to address any other issues in the first instance on remand.[3] As the

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provides evidence of a master plan to fire Vorys Sater and deny it its fee is preposterous.

[2] Just how ill-advised such a rule would be is driven home forcefully by the facts of this very case. Vorys Sater's damages claim was clearly meritless and was obviously added for the sole purpose of defeating abstention. It asked for attorneys' fees (plus prejudgment interest going back all the way to the date of settlement) with respect to matching charitable contributions that had never been (and may never be) paid, even though the governing agreement provided that Vorys Sater was entitled at most to an additional fee upon "actual receipt of payment." Pet. 9. Vorys Sater prevailed on this claim in the district court only because of a procedural windfall: the district court concluded (mistakenly) that CitiGas failed to "present evidence" in opposing Vorys Sater's motion for summary judgment. *See id.* at 9-10 & n.10.

[3] *See, e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987); *United States v. Rutherford*, 442 U.S. 544, 559 n.18 (1979); *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975).

Court has stated, a possible "alternative ground" for affirmance "does not prevent us from reviewing the ground exclusively relied upon by the courts below." *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

In any event, Vorys Sater's argument is transparently meritless: no court has held a suit like Vorys Sater's to be anything other than a pure declaratory-judgment action for purposes of the *Brillhart/Colorado River* distinction. The Ninth Circuit, whose case law on this point is most fully developed, has held that, when a damages claim is "wholly dependent" upon a declaratory-judgment claim, the entire lawsuit must be treated as a declaratory-judgment action. For purposes of this test, a damages claim is "wholly dependent" if it would necessarily fall along with the declaratory-judgment claim.[4] Under this standard, it is clear that Vorys Sater's suit is a pure declaratory-judgment action subject to *Brillhart*'s (not *Colorado River*'s) standard: a loss on Vorys Sater's declaratory-judgment claim would necessarily have meant a loss on its claim for damages.[5]

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[4] *See Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 755 (9th Cir. 1996) ("Golden Eagle's request for monetary relief is wholly dependent upon a favorable decision on its claim for declaratory relief."); *Ark Telecommunications, Inc. v. State Farm Fire & Cas. Co.*, 1997 U.S. App. Lexis 16202, at *6 (9th Cir. June 27, 1997) ("appellees' claims are not 'wholly dependent' upon a favorable decision in the declaratory relief action"); *Cassio Place, Inc. v. Great Am. Ins. Co.*, 1996 U.S. Dist. Lexis 6806, at *6-*7 (N.D. Cal. Apr. 30, 1996) ("[t]he success of these [damages] claims, however, depends entirely upon the Court first favorably resolving [the] claim for declaratory relief"). The Eighth Circuit has applied a test that is even less friendly to Vorys Sater than that of the Ninth Circuit: the Eighth Circuit's test turns on whether the suit is predominantly one for declaratory relief or one for damages. *See Horne v. Firemen's Retirement Sys. of St. Louis*, 69 F.3d 233, 235, 236 (8th Cir. 1995).

[5] Pointing to CitiGas's counterclaim for damages (which the district court rejected on the same mistaken ratification rationale as that on which it rested its declaratory judgment), Vorys Sater also argues, in effect, that a declaratory-judgment defendant waives any abstention argument by filing a counterclaim. It says that "[t]he

Vorys Sater tries to escape this conclusion by giving the "wholly dependent" standard a cramped and entirely unsupported reading. Though acknowledging that the Ninth Circuit held damages claims to be "wholly dependent" in *Golden Eagle Insurance Co. v. Travelers Cos.*, 103 F.3d 750 (9th Cir. 1996), and *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995), Vorys Sater argues that the damages claims there were "dependent" in the sense that the plaintiff insurance companies asked for damages only as alternative relief in case the court would reject their declaratory claims. *See* Br. in Opp. 17 n.7. Vorys Sater apparently believes that this is the *only* way in which a damages claim can be "wholly dependent."

But *Golden Eagle* and *Karussos* themselves show that this is not so. In both cases, an insured who had two insurers was sued in state court; the first insurer defended the insured, but the second insurer refused, saying that its policy did not cover the incident at issue. The first insurer then sued the second in federal court, demanding (1) a declaratory judgment that the second was required to defend and indemnify, and (2) damages to contribute to expenses incurred in defending the insured. *See Golden Eagle*, 103 F.3d at 753; *Karussos*, 65 F.3d at 798. Under *those* circumstances, the Ninth Circuit held that the first insurer's damages claim was "wholly dependent upon a

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Ninth Circuit has followed the same analysis in counterclaim situations, when one party seeks purely declaratory relief but the other seeks money damages." Br. in Opp. 17. But the case on which it relies, *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361 (9th Cir. 1991), involved a "counterclaim situation" only in the sense that the *defendant* had requested a declaratory judgment—the plaintiff had asked only for damages. That simply is not the case here. In *St. Paul Fire & Marine Ins. Co. v. F.H.*, 117 F.3d 435 (9th Cir. 1997), a case not cited by Vorys Sater, the defendant did request damages relief, but that case is inapposite for another reason: in *St. Paul*, there was no parallel state action, and it was the *plaintiff* who, only after losing on the merits, argued that the district court should have abstained from hearing the plaintiff's own declaratory-judgment claim. *See id.* at 436-38.

favorable decision on its claim for declaratory relief." *Golden Eagle*, 103 F.3d at 755; *see Karussos*, 65 F.3d at 801 ("If a party could avoid [the presumption] rule by the simple expedient of including [a damages claim] in its complaint, there would be little if anything left of that rule."). There was nothing alternative about the insurers' damages claims.

Unable to distinguish *Karussos* and *Golden Eagle*, Vorys Sater indiscriminately cites cases that have nothing to commend them to Vorys Sater's position other than their outcome: in these cases, courts found that, on the facts before them, the specific claims at issue were not "wholly dependent." *See* Br. in Opp. 16-18. But none of these cases can help Vorys Sater: in each, the damages claim was independent of the declaratory claim because the damages claim could prevail even if the declaratory-judgment claim failed.[6] In sum, Vorys Sater's argument

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[6] *See Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1420 n.1, 1421 n.4 (9th Cir. 1997) (besides asking for declaratory judgment that insurance company was required to defend, insured demanded damages for infliction of emotional distress); *Chamberlain*, 931 F.2d 1367-68 (insured sued insurance company demanding damages for bad-faith refusal to defend; defendant insurance company counterclaimed for declaratory judgment); *Polonitza v. Chubb Group of Ins. Cos.*, 1997 U.S. App. Lexis 16405, at *3 (9th Cir. July 2, 1997) (unpub. mem.) (besides asking for declaratory judgment that insurance company was required to defend, insured demanded "monetary relief," apparently for indemnity; court did not discuss "wholly dependent" standard); *Ark*, 1997 U.S. App. Lexis 16202, at *5-*6 (besides asking for declaratory judgment that insurance company was required to defend, insured demanded money damages on "bad faith claims" against insurer; court held that these claims were "not 'wholly dependent' upon a favorable decision in the declaratory relief action"); *Smith Mailer Mfg. v. Liberty Mut. Ins. Co.*, 1997 U.S. App. Lexis 18882, at *6 (9th Cir. July 21, 1997) (unpub. mem.) (besides asking for declaratory judgment that insurance company was required to defend, insured asserted "bad faith claims for money damages" against insurer); *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 950, 951 (5th Cir. 1994) (after aircraft's owner failed to pay for repairs, repair company sued owner for damages and for declaration that it was entitled to certain collateral).

that its suit is not a declaratory-judgment action for purposes of the *Brillhart/Colorado River* distinction is entirely meritless.

2. Next, Vorys Sater attempts to minimize the circuit split at issue—the same circuit split that it affirmatively asserted in the courts below. *See* Pet. 18 & n.23. Although Vorys Sater is compelled to concede that the Ninth Circuit has applied a presumption against the exercise of federal jurisdiction in the face of parallel state-court litigation, *see* Br. in Opp. 19,[7] Vorys Sater argues that the Ninth Circuit's presumption applies only in insurance cases, *see id.* at 19-20. But this argument flies in the face of the Ninth Circuit's own words: that court has said on numerous occasions that its presumption applies in "insurance coverage *and other declaratory relief actions*."[8] The fact that most of the relevant cases arose in an insurance context is simply a function of the fact that "the federal courts' declaratory judgment jurisdiction

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[7] Vorys Sater suggests, however, that the Ninth Circuit's grant of rehearing en banc in *Government Employees Ins. Co. v. Dizol*, 108 F.3d 999 (9th Cir.), *reh'g en banc granted*, 118 F.3d 661 (9th Cir. 1997), indicates that it is "taking steps to reconsider [the presumptive] line of cases." Br. in Opp. 2; *see id.* 19 n.8. Vorys Sater once again overplays its hand. In *Dizol*, the question presented was whether a court of appeals must raise the *Brillhart* abstention issue on its own motion when neither the district court nor the parties have addressed it. *See Dizol*, 108 F.3d at 1006. The scheduling order cited in the petition clearly indicates that the court decided to rehear the case en banc with a view to addressing that question, *see* Pet. 19 n.24; *see also St. Paul*, 117 F.3d at 437; the oral argument before the en banc court accordingly revolved around precisely that issue. (CitiGas has lodged with the Clerk of this Court copies of both the Ninth Circuit's scheduling order and the tape recording of the en banc oral argument.) If this Court nevertheless were to determine that its decision concerning certiorari might turn on the outcome in *Dizol*, it should hold this petition until the Ninth Circuit issues its decision. Because the Ninth Circuit heard en banc argument on July 24, 1997, a decision should be imminent.

[8] *See, e.g., Maryland Cas. Co. v. Knight*, 96 F.3d 1284, 1288 (9th Cir. 1996); *Karussos*, 65 F.3d at 798; *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995); *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1374 (9th Cir. 1991).

has been invoked in insurance litigation more often than in any other area." *Dizol*, 108 F.3d at 1008 (internal quotation marks omitted); *see* Pet. 20. Indeed, the Ninth Circuit most assuredly *has* applied the presumption outside the insurance context.[9]

Vorys Sater also suggests that each of the many Ninth Circuit cases cited in the petition is distinguishable on the ground that none of them involved state-court proceedings in which the applicable substantive law was that of another state. *See* Br. in Opp. 21. But Vorys Sater fails to provide any insight as to why this should make a difference. *Brillhart*'s rule is rooted in concerns about "interference with the orderly and comprehensive disposition of a state court litigation." *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 495 (1942). Such interference offends federalism principles equally regardless of which jurisdiction's substantive law applies. *See Exxon*, 120 F.3d at 169-70 (requiring abstention even though *federal* substantive law applied).[10]

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[9] *See Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166, 169-70 (9th Cir. 1997). Vorys Sater dismisses *Exxon* on the ground that the Ninth Circuit did not use the word "presumption." *See* Br. in Opp. 20 n.9. But the Ninth Circuit held that the district court had abused its discretion by retaining jurisdiction; particularly because federal law applied to the merits of the dispute, the court of appeals could reach that outcome only if it applied a presumption. *Compare Exxon*, 120 F.3d at 169-70, *with Youell v. Exxon Corp.*, 74 F.3d 373, 376 (2d Cir.), *cert. denied*, 116 S. Ct. 2514 (1996); *see* Pet. 19. Vorys Sater also tries to paint *Exxon* as sui generis, suggesting that the Ninth Circuit's decision was based solely on its displeasure with the district court's intimation that its ruling would be "binding in the state proceedings." Br. in Opp. 20 n.9. In fact, the Ninth Circuit held simply that the district court's disagreement with the state court on the merits of certain legal issues provided no "factor in favor of exercising jurisdiction." *Exxon*, 120 F.3d at 167, 169-70. Thus, far from holding that there were special reasons affirmatively militating in favor of abstention, the Ninth Circuit held merely that the factor on which the district court had relied did not militate against abstention.

[10] As one district court in Virginia recently noted in deferring to a state-court proceeding in Florida in which Virginia's substantive law would apply: " 'Our Federalism' demands deference to Florida's

Finally, Vorys Sater claims that the Ninth Circuit has held that "a district court's decision to exercise jurisdiction is not a ground for reversal when the district court has already rendered final judgment and reached the right answer on the merits." Br. in Opp. 21. The Ninth Circuit has never held such a thing. Although the Ninth Circuit has sometimes applied a harmless-error exception where it was crystal clear that a state court could have reached no result except that reached by the district court, *see Golden Eagle*, 103 F.3d at 756, it has refused to apply that exception where the applicable state-law issues were "unsettled." [11] The court below never addressed this question, and, if it had, it would have resolved the question against Vorys Sater: Vorys Sater does not (and could not) argue that the state-law issues here are settled.

Vorys Sater chooses a different line of attack on the Fifth Circuit. While conceding that the Fifth Circuit has applied a presumption against the exercise of jurisdiction, Vorys Sater argues that "[t]he Fifth Circuit . . . has given no indication that [the presumption] survive[s] *Wilton*."

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strong State interest in deciding a case calling for the application of a sister State's law. Certainly the Florida court can apply Virginia, Kansas, or Maryland substantive law under the applicable choice of law rule as well as this court could under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Granting a stay of the [declaratory judgment] action in deference to the Florida action acknowledges this reality." *Perdue Farms, Inc. v. Hook*, 1997 U.S. Dist. Lexis 16567, at *20 (W.D. Va. Oct. 17, 1997). One Ninth Circuit decision—again not cited by Vorys Sater—could be read to suggest that, in certain circumstances, the fact that out-of-state law applies in the state action might be relevant to the absention question. *See Allstate Life Ins. Co. v. Roth*, 1996 U.S. App. Lexis 27743, at *6 n.2 (9th Cir. Sept. 18, 1996) (unpub. mem.). But this decision, which lacks precedential value in the Ninth Circuit and which treated the issue summarily in a footnote, clearly did not survive the *Exxon* decision cited in the text.

[11] *See, e.g., Nucor Corp. v. Aetna Cas. & Sur. Co.*, 1997 U.S. App. Lexis 6155, at *5-*6 (9th Cir. Mar. 28, 1997) (unpub. mem.); *Allstate Ins. Co. v. McFarlin*, 1997 U.S. App. Lexis 6135, at *8 (9th Cir. Mar. 28, 1997) (unpub. mem.); *Dizol*, 108 F.3d at 1008; *Karussos*, 65 F.3d at 799-800 n.1.

Br. in Opp. 22. But there is no reason to think that it would not survive *Wilton*. *See* Pet. 20-21. District courts within the Fifth Circuit have accordingly continued to apply the applicable presumption even after *Wilton*. *See, e.g., Little Giant Mfg. Co. v. Chromalox Indus. Heating Prods.*, 1996 U.S. Dist. Lexis 9079, at *18-*19 (E.D. Tex. June 26, 1996); *Bituminous Fire & Marine Ins. Co. v. Fontenot*, 907 F. Supp. 193, 196-97 (M.D. La. 1995); *Canal Indem. Co. v. Wilburn Container X-Press, Inc.*, 907 F. Supp. 185, 188-89 (M.D. La. 1995).[12]

3. Finally, Vorys Sater claims that this case is not a good vehicle for resolving the circuit conflict because the district court said that it involved "unique circumstances." But this is merely a play on words. "Extraordinary circumstances" for purposes of the *Brillhart* analysis exist when the issues in the federal action *cannot* be litigated in the state forum.[13] Vorys Sater does not—and cannot—identify any such circumstances here, because none exist. *See* Pet. 23. By contrast, the district court's "unique circumstances," besides being insubstantial on their own terms, *see id.* at 24, reflect the district court's perception of which forum would be better suited and more con-

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[12] Vorys Sater relies heavily on *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir.), *cert. denied*, 118 S. Ct. 69 (1997), but that decision cannot bear the weight Vorys Sater places on it. Although the Fifth Circuit there affirmed a district court's decision rejecting an abstention motion, the Fifth Circuit's opinion dealt with the issue in a single paragraph that did not mention any of the Fifth Circuit cases cited in the petition. *See* Pet. 15 n.14. That is not surprising: the *Valsamis* defendants' briefs had not even cited the seminal Fifth Circuit case of *Texas Employers' Insurance Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989), and indeed affirmatively (and wrongly) argued that "the Fifth Circuit standard for exercising declaratory judgment jurisdiction allows the district court broad discretion." Reply Br. of Appellants, *Cornhill Ins. PLC v. Valsamis, Inc.*, No. 95-20898 (5th Cir. filed May 24, 1996). Thus, *Valsamis* can hardly be read as the Fifth Circuit's sub silentio overruling of its pre-*Wilton* presumption cases.

[13] *See generally Brillhart*, 316 U.S. at 495-96.

venient for the resolution of the issues,[14] a consideration that is irrelevant under the proper standard. In any event, the *court of appeals* did not see any "unique circumstances" in this case, *see* Pet. App. 5a-6a, and it is clear that, under the proper standard, it could not have found any such circumstances.

In sum, none of Vorys Sater's objections to review have any merit. There is a conflict among the Circuits; the presumption-less approach of the courts below is clearly in error; and the circumstances of this case, in which the court of appeals permitted the district court to pre-empt a state-court suit on the eve of trial, make it a particularly appealing vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 18, 1997

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[14] *See, e.g.*, Pet. App. 23a.